TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 287

JOHN BARR, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

PETITION FOR CERTIORARI FILED JULY 26, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

CUSTOMS APPEAL NO. 4461

THE UNITED STATES, Appellant

vs.

JOHN BARR, Appellee

PETITION FOR REVIEW—Filed September 8, 1943

To the Honorable the United States Court of Customs and Patent Appeals:

Your petitioner, being dissatisfied with the decision and judgment of the United States Customs Court in each of the matters referred to in the annexed Schedule A, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision and judgment with which your petitioner is dissatisfied are set forth in the annexed Assignment of Errors.

Dated New York, N. Y., September 7, 1943.

The United States, By Paul P. Rao, Assistant Attorney General, Attorney for Appellant, 201 Varick Street, New York, N. Y.

ASSIGNMENT OF ERRORS

The United States Customs Court has erred as follows:

1. In denying defendant's motion to dismiss the protest.

2. In not dismissing the protest on the ground that it presented a nonjusticiable question.

3. In not dismissing the protest on the ground that it did not state a good cause of action.

[fol. 2] 4. In holding with respect to Section 522 (c) of the Tariff Act of 1930 as follows:

• • • Nothing in the language quoted can by any stretch of the imagination be interpreted as conferring

power upon the Secretary to accept or reject any rate, or to make any determination as to whether the rate is or is not proper. The only authority given the Secretary is to make such determination public and in this he is given discretion as to the time and extent of the publication. * * *

5. In holding that the rule of construction permitting plural interpretation of nouns used in the statute in the singular, when such construction effectuated the legislative intent, applied in the case at bar and justified the action of the Federal Reserve Bank in certifying two rates of exchange for the Pound Sterling.

6. In holding in effect that the publication and use of two rates of exchange in the case at bar was harmonious with the legislative objective of statutes which sought to regulate the value of foreign currency in such a manner that the assessment of duties on imported merchandise would be uniform.

7. In finding in effect that the value of the merchandise in the case at bar was expressed on the invoice in depreciated currency.

8. In holding that the statutory procedure regulating the method for determining the value of foreign currency made untenable the contention of the Government that the Secretary of the Treasury had the power either to reject both rates certified by the Federal Reserve Bank in the instant case, or to determine which of the two rates was proper.

9. In holding that the power of the Secretary of the Treasury under Section 522 (c) was merely ministerial.

10. In holding as follows:

* * * It is the opinion of the court that when the Federal Reserve Bank on the date of exportation of the instant merchandise, viz, May 3, 1940, certified two buying rates for pounds sterling, one denominated "free" and the other "official" it was the duty of the Secretary, under section 522 (c), *supra*, to publish both rates.

11. In holding that the Secretary of the Treasury did not have the power, under Section 522 (c), to reject both rates which had been certified by the Federal Reserve Bank or to select the proper rate.

12. In holding that the action of the Secretary of the Treasury, in selecting one of the two rates published, was subject to judicial inquiry.

13. In not holding that the publication by the Secretary of the Treasury of the rate of Exchange of the Pound Sterling for the times relevant to the instant controversy was binding and conclusive on all parties, including the Customs Court.

[fol. 3] 14. In not holding that the reasons which prompted the Secretary to publish the rate of conversion to be used for the British Pound were not subject to judicial scrutiny.

15. In holding in effect that the court was here reviewing the action of the Collector of Customs and not the action of the Secretary of the Treasury.

16. In holding that the Secretary of the Treasury, under the circumstances in the case at bar, was compelled to publish both rates of exchange, and that the collector was empowered to select the correct rate.

17. In finding and holding that the collector should have used the "free" rate of exchange in converting the currency of the instant invoice.

18. In not overruling the protest because the plaintiff had failed to prove a *prima facie* case.

19. In not overruling the protest on the ground that it did not state a good cause of action.

20. In not overruling the protest on the ground that the relief which it sought had already been granted.

21. In holding as follows:

It may be noted that the stipulation herein recites that the payment in this particular case was made at the exchange rate of $3.21. True, this rate of exchange has little bearing on the question presented; nevertheless it raises an inference that the currency of the invoice here involved was in pounds sterling which were convertible at the "free" rate.

Schedule A

Port: New York, N. Y.
Subject: Currency Value.

Decided July 30, 1943.
Importer, John Barr; Protest, 57467-K/1584; Vessel, *Britannic;* Entry No. 813191; Date of entry 5/13/40.

STATE OF NEW YORK,
City and County of New York, ss:

Louis Rosenberg, being duly sworn, deposes and says that he is over age of 21 years; that he is a Clerk in the office of the Assistant Attorney General in charge of customs cases; that on the 6th day of September 1943, deponent served the within Petition for Review upon Barnes, Richardson & Colburn, attorneys for the importer herein, by depositing a true copy thereof, properly inclosed in a securely closed and duly franked official wrapper of the United States Department of Justice, in a letter box duly maintained by the United States Government and under the [fol. 4] care of the Post Office at New York City, addressed to said Attys. for Appellee at No. 2 Rector Street, New York City, that being the address designated by Appellees, Atty. for that purpose upon the preceding papers herein.

Louis Rosenberg.

Sworn to before me this 6th day of September, 1943.
Mary K. McQuade, Notary Public. Commission expires March 30, 1945. (Seal.)

[File endorsement omitted]

IN UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

[Title omitted]

NOTICE OF APPEARANCE—Filed September 11, 1943

Please take notice that we are retained by and do hereby appear for John Barr in the above-entitled action and demand that copies of all papers be served on us at our

office, No. 2 Rector Street, Borough of Manhattan, City, County, and State of New York.

Dated September 9, 1943.

Yours, &c., Barnes, Richardson & Colburn, Attorneys for Appellee, Office & P. O. Address, No. 2 Rector Street, Borough of Manhattan, New York 6, N. Y.

To: Hon. Paul P. Rao, Assistant Attorney General, Attorney for Appellant, 201 Varick Street, New York 14, N. Y.; Hon. Arthur B. Shelton, Clerk, United States Court of Customs and Patent Appeals.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES CUSTOMS COURT

Suit 4461

THE UNITED STATES, Appellant,

v.

JOHN BARR, Appellee

CLERK'S CERTIFICATE

The petitioner above named, having applied to the United States Court of Customs and Patent Appeals for a review of the questions of law and fact involved in a decision of the United States Customs Court in the above case, and the said Court having ordered this Court to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the United States Customs Court does hereby transmit to said Court of Customs and Patent Appeals the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specificaliy comprises the following: A copy of—

1. Protest 57467-K/1584 and report of collector of customs.

2. Proceedings before the court December 17, 1941.
3. Motion to dismiss.
4. Proceedings of June 3, 1942, and testimony taken before the court September 30, 1942.
5. Stipulation of counsel.
6. Exhibits 1, 2, 3, 4, Coll. 5, 6, 7, 8, and 10, referred to in the testimony.
7. The decision in question, C. D. 801, and judgment.

The entry papers will be forwarded later.

Witness The Honorable Presiding Judge of the United States Customs Court, this 29th day of September A. D. 1943.

J. W. Dale, Clerk. (Seal.)

Conversion of Currency.

IN UNITED STATES CUSTOMS COURT

Protest No. 57467-K/1584

COLLECTOR OF CUSTOMS,
Port of New York:

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties, and your decision (including the [fol. 6] legality of all orders and findings entering into the same) assessing duty, on the entries below named. The reasons for objection are as follows:

In liquidation, the currency of the invoices should be converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (c) of the Tariff Act of 1930, such buying rate varying by more than 5 per centum from the rate proclaimed by the Secretary of the Treasury under the provisions of Section 522 (b).

We further claim that the assessment of duties and taxes made herein is illegal and void.

Vessel, Britannic; Entry No. 813191; Entered 5/13/40; Bond No. C; Liquidated 12/19/40 F.

Respectfully, H. W. Robinson & Co. John Barr.

Notify Strauss & Hedges, Attorneys, 2 Rector Street, New York City.

1584. H. W. Robinson & Co., John Barr. 813191. Rate of Exchange. Filed, Mar. 3, 1941. U. S. Customs Court. J. W. Dale, Clerk. Received Protest Section, Jan. 22, 1941. Custom House, New York. 57467-K. Decision Reviewed and Affirmed. Harry M. Durning, Collector, Per (Illegible), Feb. 25, 1941.

In United States Customs Court

Report of the Collector

Memo re Protest 1584 of 1941

The merchandise covered by the cited entry (or entries) was invoiced, entered and appraised in English Pounds (Sterling). The value of such foreign currency certified to by the Sec. of the Treasury, in accordance with Sect. 522 (c), Tariff Act of 1930, was $4.035 per pound sterling. The proclaimed value of such currency for the quarter during which the goods were exported was, $8.2397. The value so proclaimed, varying by more than 5% from the value certified for the date of exportation, the latter (certified) value was used in converting the foreign exchange in liquidation, in accordance with Sect. 522, Tariff Act of 1930 and Art. 822, Customs Regulations of 1937.

The protest was filed within 60 days of liquidation.

Harry M. Durning Collector. F. M. J. Dunne.

Pounds Sterling.

[fol. 7] In United States Customs Court, Third Division

John Babr, Plaintiff,

vs.

The United States, Defendant

Protest No. 57467-K

Proceedings Before the Court

New York, N. Y.,
December 17, 1941.

Before Judge Cline, Judge Keefe

Appearances:

Strauss & Hedges, Esquires, and Barnes, Richardson & Colburn, Esquires, associate counsel, for the plaintiff, by

J. Bradley Colburn, Esquire, of counsel. Paul P. Rao, Esquire, Assistant Attorney General, for the defendant, by Joseph F. Donohue, Esquire, special attorney, of counsel.

Mr. Colburn: I ask that the appearance be noted generally of Barnes, Richardson & Colburn as associate counsel.

This protest, if the court please, is one of a very large number pending before the court. It involves the proper conversion of pounds sterling into United States dollars for the purpose of assessment and collection of tariff duties.

All of these protests allege that the Collector of Customs in converting the currency of the invoice into United States dollars for the purpose of assessment and collection of duties failed to follow the law as set forth in Section 522 (c) of the Tariff Act of 1930, and that his conversion of currency was accordingly illegal, null, and void.

The facts are clear, and I believe are well known to the United States, to the importers, and to the public generally.

With this in mind, a stipulation was prepared and submitted to the United States, setting forth the known relative facts.

The United States has refused to sign that stipulation, and is about to move to dismiss this protest, on the ground this court has no jurisdiction to decide what I believe is the only question here presented, that is, whether the Collector of Customs has followed the provisions of Section 522 (c) in converting foreign currency into United States dollars.

In other words, as we view it, the Government proposes by its motion to have this court adopt as a rule of law the proposition that this court has no power or duty to review [fol. 8] any action of the Collector of Customs insofar as such action may relate to conversion of currency, whether or not facts are known or susceptible of proof which may establish such action of the collector to be in disregard of existing provisions of law.

It is not my disposition this morning to attempt to present to the court the details of the factual situation or to argue the question of law or fact that are involved in these cases.

It has been agreed between counsel, subject to the approval of the court, that the motion of the United States to dismiss this protest be filed this morning; that counsel for the defendant have 30 days from the date hereof for the purpose of filing a memorandum supporting its motion, and

that counsel for the plaintiff have 30 days thereafter to reply; that reply briefs may be filed in the discretion of the court if timely application is made therefor; and that the test case may be removed from the trial calendar of the court pending decision on the motion to dismiss, it necessarily, of course, being contemplated by counsel it would request the court to reserve decision on this motion until after receipt of the briefs.

Mr. Donohue: If the court please, I concur in the oral stipulation proposed by Mr. Colburn respecting the time for filing of briefs.

As to the motion to dismiss I do not, of course, concur in his presentation of the only issue involved in this case.

It is the contention of the Government that this case presents a question which is not justiciable; and secondarily, that the protest does not present a good cause of action. We will argue those points at length in our brief.

I ask now that our motion to dismiss the protest be filed.

Judge Cline: Motion will be filed.

Mr. Donohue: Counsel requests jointly that the case be taken from the trial calendar until the court renders a decision on the motion to dismiss.

Judge Cline: So ordered.

Mr. Colburn: And we understand the court has likewise by its ruling given the time requested for briefs in this matter.

Judge Cline: What time do you want? You will want to brief that, I believe, as soon as you can.

Mr. Donohue: We request 30 days from today for the purpose of filing our memorandum.

Mr. Colburn: And we ask 30 days thereafter to reply.

Judge Cline: Time for briefs as requested granted.

[fol. 9] In United States Customs Court, Third Division

[Title omitted]

Motion to Dismiss—Filed in Open Court December 17, 1941

Paul P. Rao, Assistant Attorney General of the United States and counsel for defendant herein, moves to dismiss

the protest in the above-entitled matter on the following grounds:

(1) The issue sought to be raised by this protest is not subject to judicial review.

(2) The protest and the official papers in the jacket show on their face that they do not state a cause of action against the defendant.

Paul P. Rao, Assistant Attorney General, Attorney for the Defendant, by Joseph F. Donohue, Special Attorney.

Due and timely service of a copy of the within motion is acknowledged this 15th day of December 1941.

Barnes, Richardson & Colburn, Attorneys for the Plaintiff; J. Bradley Colburn.

In United States Customs Court, Third Division

John Barr, Plaintiff,

vs.

The United States, Defendant

Protest No. 57467-K—Oral Argument on Motion to Dismiss

Proceedings Before the Court

New York, N. Y.,
June 3, 1942.

Before Judge Cline, Judge Keefe, Judge Ekwall

Appearances:

Strauss & Hedges, Esquires, and Barnes, Richardson & Colburn, Esquires, as associate counsel, for the plaintiff, by J. Bradley Colburn, Esquire, of counsel.

[fol. 10] Paul P. Rao, Esquire, Assistant Attorney General, for the defendant, by Joseph F. Donohue, Esquire, special attorney, of counsel.

Argument on Motion to Dismiss

Mr. Donohue: May it please the court, this action arose by protest against the rate of conversion used by the collector in converting the currency of the invoice.

The Government is here to argue a motion heretofore filed to dismiss the protest, on two grounds:

First, that it presents a nonjusticiable question;

Second, that the protest and the accompanying papers show on their face that no cause of action is presented.

The merchandise in controversy is woolen cloth. The paragraph under which it was classified and the rate of duty at which it was assessed are not challenged by the protest.

The single claim in the protest with which we are concerned is the allegation of the plaintiff that the collector should have converted the currency of the invoice at the buying rate of exchange, in accordance with the provisions of Section 522 (c).

The complaint in the protest reads as follows—it is quoted in page 4 of the Government's brief:

"In liquidation, the currency of the invoices should be converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (c) of the Tariff Act of 1930, such buying rate varying by more than 5 per centum from the rate proclaimed by the Secretary of the Treasury under the provisions of Section 522 (b).

"We further claim that the assessment of duties and taxes made herein is illegal and void."

For the purposes of this argument we will disregard the last claim, the last sentence in the protest. It is a general allegation which has not been pressed by the importer up to this point, and we will confine ourselves to the contentions that this protest seeks:

(1) To raise a nonjusticable question; and

(2) To present a cause of action which is shown by the papers in the case already to have been granted.

The law governing the conversion of currency is found in Section 522 of the Tariff Act of 1930, which is set forth in page 92 of the Government's brief.

Section 522 (a) provides that the Director of the Mint shall estimate quarterly the value of foreign currencies and shall furnish such estimate to the Secretary of the Treasury, who shall proclaim the values of such currencies.

Section 522(c) provides that if no such proclamation has been made or if the rate proclaimed varies by more than 5 per cent from the buying rate, as measured on the [fol. 11] New York market, then the Federal Reserve Bank shall determine such buying rate from cable transfers, shall certify such buying rate to the Secretary of the Treasury, who shall publish it to the extent which he deems necessary.

It is not questioned by either side in this case that the proclaimed rate varies by more than 5 per centum from the buying rate, and therefore we are in agreement that the rate should be determined in accordance with the provisions of Section 522 (c).

The merchandise at bar was exported on May 3, 1940, and the buying rate under 522 (c) must be determined as of that date.

By a Treasury Decision, published as T. D. 50134, set forth in page 95 of our brief, the Secretary of the Treasury directed Collectors of Customs to use the so-called official rate of conversion.

I should say that for that date the Federal Reserve Bank had certified to the Secretary of the Treasury two rates for the British pound sterling; one was described as official; the other was described as free. The rates differed in value. The Secretary of the Treasury directed Collectors of Customs to use the official rate. The Collector of Customs, in converting the invoice in the instant case, used the official rate.

The point which the importer seeks to raise by this protest, the point which he argues in this brief, is that the other rate should have been used, the free rate.

The Government does not concede that this point is properly pleaded; but assuming for the moment that it is, we assert that the question presented by the protest is nonjusticiable, because the limit of judicial inquiry is to ascertain whether Section 522 (c) has been followed; that is, whether a rate has been certified by the Federal Reserve Bank to the Secretary of the Treasury, whether the rate certified has been published, and whether the rate published has been used. In brief, compliance with the statute. If those facts appear in the papers we assert that the court will make no further judicial inquiry to ascertain the correctness of the rate.

I should say at the outset that this motion to dismiss is no endeavor on our part to be technical or to attack the mere

words of the protest. We assert that the fundamental question which it seeks to raise was determined by the Supreme Court of the United States over 60 years ago to be a question which has been reposed exclusively in the executive department of the Government and is not subject to judicial review; that neither this court nor the Supreme Court nor any court will review the action of the Secretary in ascertaining the rate of exchange; and consequently, that the question presented is not subject to judicial review.

[fol. 12] This position is supported, first, by reference to the historical background of the various statutes governing the value of foreign currency.

The first law which was passed governing the value of foreign currency was enacted by Congress in 1789, and there the values of the currency of each country were set forth. Thus it is apparent that Congress retained unto itself the right to fix the value of currency; and obviously, such legislation is no more subject to judicial review to determine its wisdom or accuracy than would be any other law.

By a subsequent amendment to the statute, however, it was provided that consular certificates could be furnished accompanying invoices—rather, this was a regulation, not an amendment. The regulation was made pursuant to an amendment. The regulation provided that consular invoices could be submitted, consular certificates could be submitted with invoices, to show a value of a foreign currency different from the value which had been fixed by statute.

That situation existed with respect to the state of the law from 1789 until 1873, and then it was provided by statute that the value of foreign coins should be estimated annually by the Director of the Mint and proclaimed by him—estimated by him and proclaimed by the Secretary of the Treasury, and that the value so estimated and proclaimed should be used in the conversion of invoices and for all custom-house purposes.

That statute was reviewed by the Supreme Court in the case of *Collector* vs. *Richards*.

The Director of the Mint, in his interpretation of the duty which had been conferred upon him by statute, issued two lists of the values of foreign currencies. In one he set forth the coin value in gold of the perfect coin of each foreign currency. In the other he set forth the coin value of the

standard coin in circulation. He calculated that there would be a slight diminution in value of the standard coin in circulation, because it was used in commerce and worn until a slight fraction of its weight was lost. So he furnished the Secretary of the Treasury with two lists, each showing a different value for the respective currencies than the other.

We consider this fact is worthy of the attention of the court because here, in one of the earliest cases on currency, the Director of the Mint, in performing a duty comparable to the duty of the Federal Reserve Bank here, estimating the value of coins, furnished the Secretary of the Treasury with two estimates of varying values for each coin; and the Secretary of the Treasury chose the one which was to be used in the liquidation, in the conversion of currencies in the liquidation of invoices; and the Supreme Court held that the choice made by the Secretary of the value of foreign cur- [fol. 13] rency was final and conclusive. It didn't review the manner in which he made his choice, nor the reasons. It stated only that the action of the Secretary in determining the value of foreign coins was final and conclusive.

The 1873 statute came before the Supreme Court in 1880, in the case of *Cramer* vs. *Arthur*. That case arose by protest by the importer complaining that he had been assessed too high a rate of duty because the Collector had improperly converted the currency of the invoice. The currency of the invoice was Austrian florins. The Secretary had found that silver was the standard of currency in Austria, and that the silver florin had a stated value. The Collector had accepted that value and converted accordingly. The importer claimed that gold was the standard of currency in Austria and that the value of the florin in gold differed from its value in silver and that he was entitled to have the currency of the invoice converted at the gold value.

Now, in establishing its case the Government offered two things: first, the consular certificate, showing the value of the currency; and second, the proclamation of the Secretary showing that the value proclaimed was the value used. It offered in evidence nothing more.

From the facts in the case it is apparent that the court was of the opinion that the importer's contention was intrinsically correct, that the Government had used the wrong standard in converting. Nevertheless, the court held that the finding of the Secretary as to the value of the currency

was final and conclusive; and this language is worthy of note:

"Parties cannot be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving by parol, or by financial quotations in gazettes, that its valuations are inaccurate."

In other words, the proof was held by the court to be irrelevant to the case.

The court stated further—and I won't burden the court with too many quotations, but I think this is relevant:

"The proclamation of the Secretary and the certificate of the consul must be regarded as conclusive. In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained."

Now, that is exactly the situation here. The currency has been determined by the Secretary of the Treasury, the rate [fol. 14] of conversion has been fixed, the rate of conversion fixed by the Secretary has been used.

We submit that the *Cramer* case precludes this court from further inquiry.

The statute of 1873 was covered, without material change, into the revised statutes of a later date; and in 1885 the Supreme Court considered the case of *Hadden* vs. *Merritt*, and I won't relate the facts in that case, because they are substantially similar to the facts in the *Cramer* case. But I would like to read from the decision, because the language there is stated as if it were written for the Government's brief in this case:

"The value of foreign coins, as ascertained by the estimate of the director of the mint and proclaimed by the Secretary of the Treasury, is conclusive upon customhouse officers and importers. No errors alleged to exist in the estimate, resulting from any cause, can be shown in a judicial proceeding, to affect the rights of the government or

individuals. There is no value, and can be none, in such coins, except as thus ascertained; and the duty of ascertaining and declaring their value, cast upon the Treasury Department, is the performance of an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision. If any error, in adopting a wrong standard, rule, or mode of computation, or in any other way, is alleged to have been committed, there is but one method of correction. That is to appeal to the department itself. To permit judicial inquiry in any case is to open a matter for repeated decision, which the statute evidently intended should be annually settled by public authority, and there is not, as is assumed in the argument of the plaintiff in error, any such positive and peremptory rule of valuation prescribed in the statute as serves to limit the discretion of the Treasury Department in making its published estimate, or would enable a court to correct an alleged mistake or miscalculation."

That language says all that we say in the case at bar. It says that the matter has been reposed by statute in the executive department of the Government. It says that the value of foreign coins is to be proclaimed by the Secretary of the Treasury. It says that there shall be no judicial inquiry to correct an alleged error or mistake.

We say in the case at bar that there shall be no judicial inquiry to review the facts which the plaintiff seeks by this protest to have reviewed.

Our appellate court passed upon the same statute in the case of *Clarke* vs. *United States*, and of course, it is to be expected that our appellate court would follow the Supreme Court.

[fol. 15] I have discussed the case at length in the brief. To restate the facts is to restate substantially the facts in the case at bar. To restate the law as found by the appellate court is to restate the law in the *Cramer* vs. *Arthur* and *Hadden* vs. *Merritt* cases.

Now, the law as discussed in those cases continued without substantial change until 1921, when Section 403 was enacted, which is substantially similar to the statute now under consideration. Therein it was provided that in lieu of the consular certificates that the Federal Reserve Bank should publish daily findings of the buying rate of foreign

currency, should certify these rates to the Secretary of the Treasury, and the Secretary of the Treasury should publish such rates.

That statute was reenacted into the Tariff Act of 1922, and then again into the Tariff Act of 1930, and the Congressional intent of enacting the statute is important in the consideration of this case, because if Congress sought to change the fundamental procedure which had been followed since 1789, then perhaps these cases which I have just discussed would be, as the plaintiff has said, of historical interest only. But our appellate court discussed the purpose of the new statute of 1921 in the case of *Fry & Friedsam* vs. *United States*, which is cited in page 37 of the Government's brief; and the court found there that the purpose of this new statute was to provide a more expeditious manner of determining the value of foreign currencies, the need for such expeditious determination being occasioned by the violent fluctuations in foreign currencies which followed the first World War.

Now considering that statute with the earlier statutes, it must be apparent to the court that both statutes have two purposes. One was to determine the value of the metal coins; and that value, logically enough, would be determined by the Director of the Mint, whose duty it is to know the value of metal coins and to compare the value of foreign coins with the value of United States coins.

The other purpose of the earlier statutes, as indicated by the provisos allowing for consular certificates, was to give the Secretary some information as to the values of foreign currencies when those values departed from the metal value; and naturally enough, in the early days a consular certificate was evidence of such value or, as provided by a later proviso, in 1894, any evidence which was brought to the Secretary of the Treasury showing a value of currency different from its proclaimed value would justify a reliquidation of the entry.

Now, there were two purposes embodied in the earlier statutes—to find the value of metal coins and to find the rate of exchange in currency when it differed from the metal value.

What is the purpose of the present statute?

[fol. 16] Section 522 (a) fixes the value of metal coins by the estimate of the Director of the Mint and the proclamation of the Secretary of the Treasury.

522 (c) fixes the value of rates of exchange or of currencies of exchange which differ from metal currency, by requiring the Federal Reserve Bank to certify the buying rates and requiring the Secretary of the Treasury to publish those rates. In each instance the Secretary is furnished with a fact-finding agency; in each instance the Secretary's proclamation fixes the value, and in every case where the court has considered the proclamation it has gone no further. It has inquired only to ascertain that the value was fixed in the manner prescribed by statute; that the proclamation of the Secretary showed by its form and on its face compliance with the statute. It has gone no further.

We do not assert that the Secretary of the Treasury could find a value independently of the provisions of the statute; but we do say, and probably the court is more interested in knowing the appellate court has said, that the limit of judicial inquiry is to ascertain that this proclamation, this publication by the Secretary, shows on its face that it conforms with the provisions of the statute.

I am somewhat concerned with the assertion in pla-ntiff's brief that our cases are not relevant, that they are of historical interest only, because they do not interpret Section 522 (c) but pertain to proclamations by the Director of the Mint and subsequent publications by the Secretary of the Treasury. But I think if this court had before it a case where two estimates were furnished to the Secretary of the Treasury and the Supreme Court held that his choice of one of those two estimates was final, that would be so closely analogous to the case at bar that no room would be left for a discussion that there was a difference in the facts. So, I go back to the first case which I discussed, the *Richards* case.

There two estimates were furnished to the Secretary of the Treasury by the Director of the Mint, and the important thing is that the Supreme Court held that the rate which the Secretary published, coming as they knew it came, from one of two estimates, that that rate was final and that it would not review the action of the Secretary to determine how he ascertained that rate. And so here. The Treasury decision publishing the rate of conversion used in the instant case shows that the Secretary had two rates of con-

version certified to him by the Federal Reserve Bank, and that he chose one of them, and his action in so doing must be held, should be held, by the court to be final and conclusive.

The cases which we have cited earlier, interpreting Section 522 (c) and its predecessor statutes are directly in point, because they involve the disposition of the identical principle of law.

[fol. 17] The importer has argued in its brief somewhat at length that there were two currencies in Great Britain at May 3, 1940, the date of exportation of the instant merchandise. One was the official pound, and the other was the free pound. I believe that in our original presentation we did not discuss this matter at all, because we had faith in one fact which we thought would not be disputed, and that is that there was only one pound sterling, and that it was the currency of Great Britain.

In *Collector vs. Richards* the court took judicial notice of that fact, and, of course, this court can judicially notice the currency of a foreign country, and if there were two currencies in Great Britain on May 3, 1940, certainly there should be some evidence of that fact; certainly some document furnished by the Secretary of the Treasury should indicate that there were two currencies in Great Britain.

The importer points to the certification by the Federal Reserve Bank. The Federal Reserve Bank described the currency which it certified as pound sterling. It did not indicate that there were two currencies. It indicated that there was one currency and that there were two rates for that currency. And so the plaintiff has changed for the purpose of its argument what we assume to be an undisputed factual premise; that is, that there was only one currency in Great Britain.

As I say, there should be some support to a fact which would, I assume, be startling to the British Government, that there were two currencies in Great Britain. But if there were, there can be no doubt about the fact that the Secretary of the Treasury must determine which is the currency of the country. That was settled in the *Klingenberg* case, which is discussed in our brief, where there were two Austrian florins in circulation; one of gold and one of silver; and the Secretary of the Treasury selected the florin which he said was the standard currency, and the court held that that is not subject to judicial review.

So, assuming the factual premise on which plaintiff's case rests, that there are two currencies, that fact does not extend the scope of judicial inquiry here, because the Secretary of the Treasury has found that the currency of Great Britain is the pound sterling and that the rate of conversion is 4.035. That rate has been used in the case at bar, and that is the end of the judicial inquiry.

We conclude this point, your Honor, with the assertion that it must be apparent to the court from the cases here cited that in the first instance Congress reserved to itself the right of determining the value of foreign coins; that thereafter it delegated that right, that duty, to executive authorities; that from time to time in the development of the nation it changed the method by which that fact should [fol. 18] be determined, but that in no instance did it indicate that the value of foreign coins was to be subject to judicial inquiry.

In every case where the Supreme Court has had occasion to pass upon the point it has held that the action of the Secretary in fixing the value of a foreign currency is not subject to judicial review. I said at the outset that was the position of the Government, that the plaintiff's protest did not state a good cause of action, because it indicated on its face that the relief which it seeks by this protest has already been granted. In making that assertion we assume, of course, that the entry and the accompanying papers are considered as part of the protest. The court has so held.

Now, the protest states:

"In liquidation, the currency of the invoices should be converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (c) of the Tariff Act of 1930."

We agree with that. The currency should be converted according to the rate provided by 522 (c).

522 (c) provides that the rate shall be the buying rate as determined by the Federal Reserve Bank, certified by that bank to the Secretary, and published by the Secretary.

There was only one rate on May 3d that was determined, certified, and published, in accordance with the provisions of Section 522 (c), and that is the rate with which the instant invoice was converted. That is the official rate. That was found by the Federal Reserve Bank, certified by it

to the Secretary, and published by the Secretary, and used by the Collector in the conversion; and the papers set forth only one rate.

There is no mention, either, in this protest or the invoice or the entry of any other rate. The rate set forth in the entry is 4.035. It is characterized as official. It is the rate used on this protest.

We concede the merit of plaintiff's allegation, but we assert that the papers show that the relief sought has already been granted. Consequently the plaintiff has not stated a good cause of action.

Now, if we assume that two rates were certified and that there is some choice as to which of those rates must be used, we must determine who makes that choice; and that question has been answered by decisions in the Supreme Court. The Secretary makes the choice. And so that choice is binding on the court; and again, the plaintiff's case states no cause of action.

But, assuming that two rates were published by the Secretary, one of those rates must be used. Who is to determine which of those rates shall be used? Obviously, the Secretary of the Treasury. The Supreme Court has so held.

[fol. 19] Assuming, however, that there were two currencies in existence on May 3rd, which fact, of course, we dispute, Section 481 of the Tariff Act provides that the invoice shall state purchase price of each item in the currency of the purchase, if the merchandise is shipped in pursuance of purchase, or an agreement to purchase—the kind of currency, whether gold, silver, or paper.

The invoice here states pounds. Now, if there were two pounds in circulation in Great Britain, some indication should be given as to which of the two pounds was the currency of purchase. Obviously, if an invoice were made out in francs, and there is a Belgian franc and a French franc, the Customs authorities would be interested in knowing which of the two francs was the currency of the purchase, so that the conversion could be made at the proper rate; and so the entry papers show that the importer, at least apparently, assumed that the correct currency, if there be two, was the so-called official pound, because he stated on his entry "official," and under it the rate 4.035. So if there is to be any conversion here it must be at the

currency of the invoice; and the currency of the invoice is pounds, and the rate of conversion stated by the importer, himself, on the entry is the official rate of conversion.

One more fact should be brought to the attention of the court, and then I think our presentation is complete.

The court is well acquainted with the proposition that long continued administrative practice and legislative reenactment of a statute following an administrative practice presumes legislative approval of that practice.

The present statute, as we have stated, was first enacted in 1921, and the first proclamation of the Secretary of the Treasury, pursuant to that statute, is set forth in page 73 of our brief and I won't read it in full, but this part is pertinent:

"*Provided, however*, That if no such value has been proclaimed, or if the value so proclaimed varies by 5 per cent or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate, as determined by the Federal Reserve Bank of New York and published by me as certified by said bank pursuant to the provisions of said section 25, as amended."

Now, when the Tariff Act of 1930 was passed the form of the proclamation was altered only slightly. From that it is apparent that since the enactment of this statute of 1921 the Secretary has ruled that the rate of conversion to be used by collectors in converting currency is the rate which is certified to him by the Federal Reserve Bank and published by him. He has set himself up as the executive authority for stating the value to be used by the Collectors of Customs.

[fol. 20] Now, assuming that there never was a judicial interpretation of a prior similar statute here, in 1921 the Secretary of the Treasury instructed collectors to take the rate, not from the Federal Reserve Bank, not from the courts, but from him.

That statute was reenacted in 1922. It was the subject of judicial inquiry since that time. It was reenacted in 1930. Certainly this court must assume and should assume that the interpretation which has been given to the statute by administrative officials, the manner in which the statute has been worked as a practical proposition, has been approved by legislative reenactment.

Judge Keefe: Can we do that without evidence of that fact?

Mr. Donohue: Without evidence of the——

Judge Keefe: Long-continued practice.

Mr. Donohue: The evidence, your Honor, is contained in matters which this court may judicially notice. The proclamation or the publication of the rates by the Secretary is in the form of Treasury decisions. Those rates were used. The court can judicially notice that those rates were used. No evidence in the strict sense of the term is necessary to establish that.

That, your Honor, concludes our presentation of the reasons for our motion to dismiss.

To summarize, the true purpose of the pleading, as set forth in plaintiff's brief, is to seek a review by this court of the action of the Secretary in publishing the rate which was used. That is not subject to judicial review. The literal wording of the pleading seeks only to have the collector convert the currency of the invoice and reliquidate in accordance with the provisions of Section 522 (c). That has been done.

Mr. Colburn: If the court please, counsel for the Government has cited a number of cases going back to substantially the tariff history of the United States, and cited many more in his brief, to support the alleged argument that this court, and no court, has power to inquire into the correctness of the action of executive or administrative officers having to do with the conversion of currency of invoices of imported merchandise.

At the outset it is rather an amazing thing that strikes me. Believe it or not, I have read all those cases, and some more besides; in every one of those cases each of the courts in turn, up to and including the Supreme Court, heard the case. They didn't stop the plaintiff at the threshold and say, "No; you can't enter this court-room." They took jurisdiction for the purpose of hearing each and every one of those cases. I suggest, whatever may be the final ruling of this court, that situation certainly is true here.

Now I repeat again that those cases are interesting primarily from their historical background. Counsel has out- [fol. 21] lined the historical sequence of statutory enactments relating to currency. I need not tell this court the statute under *under* which the case at bar arose is mark-

edly different from any of those prior laws. However, we agree in the main that those cases establish the principle that no court, once a properly constituted authority has found the conversion, the rate of exchange—whether it be the value of coin or the exchange rate—that no court can substitute its judgment for that of the fact-finding body vested with authority by the Congress. All of these cases seem to so hold.

That is not the point of the importer's case here. We make no such claim. We accept and give complete verity and authority to the finding, the certification of the sole and only body charged and invested by Congress with authority to make or determine, rather, the exchange rates of currency to be used in the assessment and collection of duties, and that is the Federal Reserve Bank.

Counsel has adverted to the alleged authority of the Secretary of the Treasury. I would like to quote briefly from what our appellate court has had to say with reference to that. It is the Staedtler case, reported in 25 volume, page 136. The court, by Judge Garrett, said in part:

"It will be observed from the text of section 522 of the Tariff Act of 1930 that the authority to estimate the value of foreign coin, 'as expressed in the money of account of the United States,' is conferred upon the Director of the Mint, and the only duty required of the Secretary of the Treasury is the ministerial one of proclaiming the values so 'estimated.'"

And it goes on.

I think the court makes it clear there the very limited function with which the Secretary of the Treasury has been invested by the Congress.

If the court will look at provisions of Section 522, several other important limitations are made clear. Under Section 522 (a) it is the Director of the Mint who is to find the, estimate the value of foreign coins. Such values as found by the Director of the Mint are to be proclaimed by the Secretary, and our Court of Appeals has said that is a ministerial function.

We get to Section 522 (c), and the Congress in its wisdom has invested the Federal Reserve Bank with the power and discretion to determine exchange rates in the New York market; and there *here* is the distinction which I believe is

somewhat important. Under 522 (a) the Secretary is permitted to proclaim the values of foreign coins. Section 522 (c), the court will note the careful choice of language used by Congress, when they said in the case of exchange rates, the Secretary shall make them public.

[fol. 22] Now it seems to me a rather extraordinary thing to attempt to expand that limited ministerial function of the Secretary of the Treasury into an alleged grant of power to control the action of the Federal Reserve Bank.

On the date of exportation of the merchandise here involved the Federal Reserve Bank determined and certified two different things. For the purposes of this motion I believe the United States has conceded that fact; and perhaps under that theory of this case, in any event, this court may take judicial notice of it, one of those rates, the pound sterling, 4.035, and the word, official. Under that, in the actual copy of the Federal Reserve certification, are ditto marks under the words, pound sterling, repeating the words, pound sterling, 3.47, carried out to decimal points, the word, free.

Now, if the cases starting with the year 1789, the *Collector* vs. *Richards, et al.*, stand for anything I believe they establish the rule certification by the properly constituted authority cannot be impeached or changed.

We say that inhibition, that strieture applies to the Secretary of the Treasury fully and to as great a degree as it applies to the importer, the collector, to this, or any other court.

Here the Federal Reserve Bank certified two things. We say the Secretary of the Treasury has deliberately suppressed one of those things—sought to suppress it, I should say, because he hasn't succeeded. We say that he has no such authority under this or any other law.

I apprehend it is wholly immaterial whether the Secretary shall have published what the Federal Reserve Bank has done. We can conceive of a case where if we adopt the theory of opposing counsel the Secretary might refuse to make public a rate at all. He here has refused to make public, under this theory, one of the rates. So conceivably, he could refuse to make public the other. Then, if I understand the argument of opposing counsel, there would be no buying rate of exchange. We must perforce take the proclaimed value.

I say that there resides in this court, and necessarily resides in this court, the power and authority to review that action and to correct it.

Of course, when I say the Secretary here had failed in his apparent desire to suppress the certification of the free rate I meant to refer to the fact that the existing Customs regulations require, Article 822 (d), that the Customs Information Exchange shall circulate among Customs officers the rates of exchange certified daily by the Federal Reserve Bank. Pursuant to that regulation the rates here in question were circulated to Customs officers by the Customs Information Exchange. So, I suggest that may be a formal publication.

I don't think it is necessary, as I said, that there be any publication whatever. The Secretary can't thereby defeat [fol. 23] the purposes of the statute. But if conceivably some form of publication is necessary it resides there.

These rates have also been published in newspapers. They are published today. You can pick up the Journal of Commerce, Wall Street Journal, or any other recognized paper, and you will see the certification by the Federal Reserve Bank, rates of exchange for the official and the free.

Now, if you look at the Treasury decisions you will note that the rate certified by the Federal Reserve Bank for the pound sterling was entered about $3.50, $3.60, $3.70, day by day fluctuating up and down. If you drew a graph of it it would be a series of jagged peaks.

On March 25, 1940, as appears from the Treasury decision 50131, suddenly that graph, the line of that graph would flatten out; it became one rate. When we look at it we see it is explained as being the official or controlled rate; went into effect on March 25th. That happens to be the day—March 25, 1940—on which the Government of Great Britain put into effect the regulation by way of amendment to its existing finance regulations, known as amendment 5-b, circulated as number, statutory rule and order number 291, whereby they required that in the case of exports of 5 classes of merchandise to the United States, to wit, whiskey, furs, tin, rubber, and jute, such permit of export, such merchandise could be obtained only upon proof that such merchandise had been paid for in Great Britain with United States dollars or with the use of pounds sterling purchased at a fixed or controlled or official rate of exchange estab-

lished by the British Government. All other merchandise, including that at bar, woolen—fancy woolen goods—was not restricted, but continued to be exported to the United States under the previously existing modes of payment, to wit, purchase in the New York market by cable transfer, pounds sterling.

That is the explanation of the two rates, the two things that the Federal Reserve Bank has done, and we suggest to this court what may circulate in Great Britain and what His Excellency, Lord Halifax, the British Ambassador, may have to say on information and belief supplied to him has no relevancy or materiality to the question here; that once the Federal Reserve Bank has certified that there were two buying rates of exchange in the New York market at noon on a particular day that is final and conclusive; that that perforce establishes, and not even the august Secretary of the Treasury may question it.

There were two sorts or kinds of pounds sterling for the purposes of Section 522 (c).

Judge Ekwall: I understand there is no dispute between counsel up to that point, that there was a determination by the Federal Reserve Bank of two rates; is that correct?

Mr. Donohue: That is correct, your Honor.

[fol. 24] Judge Ekwall: In other words, that is conceded, that there was?

Mr. Donohue: It is conceded that the two rates were certified to the Secretary, yes, your Honor.

Judge Ekwall: Of course, there was only one published by the Secretary of the Treasury.

Mr. Donohue: Yes, your Honor.

Judge Ekwall: Or proclaimed; but this statement, you concede that for the sake of circumstance?

Mr. Donohue: I concede the two rates were published and described as official and free. I do not concede that there were two currencies.

Judge Ekwall: No; I understand that.

Mr. Colburn: We say that perforce, by virtue of the action of the Federal Reserve Board, there were created for the purposes of interpretation and application of Section 522 (c), two types or kinds of pounds sterling, dependent upon the character of the goods that were being exported to the United States. That was a requirement, and dealt only with the trade between the United States and the United Kingdom. What may have existed or been required within

the boundaries of the United Kingdom I suggest this court is not concerned with.

The merchandise at bar was purchased and paid for with the character or the kind of pound sterling that was bought in the New York market by cable transfer, not controlled by the British Government; it was a free pound.

It is our theory that the merchandise, accordingly, should have been converted by the Collector of Customs at the rate determined and certified by the Federal Reserve on the day of exportation of this merchandise for that sort or kind of currency.

Now, counsel has adverted to the entry in the case at bar, but seeks to make much, in a reply memorandum filed here, of the fact that on the entry in type writing there appears the figures 4.035, followed by the word, official. Of course, the fact is that has nothing to do with his entered value. He entered it in pounds and shilling. Its entered value, I believe, was 60 pounds and 9 shillings.

For the purpose purely and only of completing a calculation of the estimated duties to be deposited by the importer he converted those pounds on that invoice and entry into dollars, and he did that conversion; and the only rate that the collector would accept, the Collector of Customs required each and every importer to convert and deposit estimated duties on the basis of the official pound, rate for the official pound. The United States now seeks to take advantage of that requirement and say the importer, because of that, is now debarred from the question.

If the importer entered his merchandise under Paragraph 355, at a particular rate of duty and thereafter filed [fol. 25] protest, claiming it is under a different paragraph, I assume this court would not question his right to do so. I don't see where the fact that it would be a fact that he put this on his entry has anything whatever to do with this question.

This court has many times taken jurisdiction and decided question on all fours with that here.

We say that the Collector of Customs, whether he acted on his own behalf or pursuant to these instructions of the Secretary of the Treasury, has committed error. He has converted on the basis of the rate for a currency that was not that of the invoice at bar.

There is in existence a certification by the only authority vested by the Congress with power to determine exchange

rates, to wit, the Federal Reserve Bank, a rate for that type and kind of currency. That is all this court has to decide.

Much of what has been said, unfortunately, has gone to the merits of this case.

The question before your Honors this morning is a relatively narrow one, one that you have, I believe, acted upon many times previously. Are you going to stop, refuse to hear the facts of this case? Are you going to even throw this out of the window?

I say that the theory of the United States leads inevitably to the conclusion or the argument that this court has no jurisdiction whatever in any currency matter. Are you going to continue the practice which has existed throughout the history of the prototype statutes of that now in existence, to consider and correct an error which the collector has committed?

Mr. Donohue: May I have a few moments to reply?

Of course, we have pointed out in our brief that there are many types of currency cases which this court can consider and this court could, of course, review the action of the collector in the case at bar to determine whether or not he used the rate of conversion which he is required to use under Section 522 (c). But we contended in our presentation that the matter sought to be presented to the court by this protest is nonjusticiable, in that it involved a review of the action of the Secretary of the Treasury.

We pointed out cases which have heretofore been decided, saying that that action is not subject to judicial review.

The importer has not questioned that this protest involves a review of the action of the Secretary of the Treasury. He has indicated——

Judge Ekwall: If I understood his argument correctly he argued just the opposite. He argued that it didn't make any difference what the Secretary of the Treasury did, that the Federal Reserve Bank was the only agency of the Government that had vested in it the right to proclaim [fol. 26] these rates, and that they did that, and that whatever the Secretary of the Treasury might have done or might not have done, as I interpret his argument, would be the action of the collector. Isn't that——

Mr. Colburn: That is substantially my argument; yes, your Honor.

Judge Ekwall: The collector and the Secretary of the Treasury, as I get their argument, would be the same thing. In other words, we are not called upon to review the action of the Secretary of the Treasury; we are called upon to review the action of the Collector of Customs.

Mr. Donohue: Well, we don't question that, your Honor. That is to say, we don't question that if the Secretary's proclamation of the rate was illegal it is no defense for the Government to say that the collector followed the instructions of the Secretary. And so it is as your Honor has stated. The collector is acting under instructions from the Secretary, and the action of both must be valid or void. We agree on that point.

But then what action is being reviewed here? The rate of exchange employed.

Who furnished that rate of exchange? The Secretary of the Treasury. He instructed collectors to use it. That is set forth in the pertinent Treasury decisions.

Judge Ekwall: Well, that is just the point. We are just beating the devil around the bush here. We are getting right back to the same point.

As I understand, the whole argument is centered around whether the Federal Reserve Bank is the agency that has the right to proclaim these rates, or whether the publishing of the rates or of one rate by the Secretary of the Treasury is controlling upon the court.

Mr. Donohue: If that is the plaintiff's contention we are quite willing to join issue on that. If the plaintiff reads the statute to say that the Federal Reserve Bank has the attributes of the Secretary of the Treasury for the purpose of instructing Collectors of Customs what rate to use then we are quite willing to join issue on that proposition.

In other words, the statute says that the Secretary shall make public the rate to be used.

Judge Keefe: That is his sole duty, isn't it, in this matter? The Secretary of the Treasury shall make public the determination of a rate made by the Federal Reserve Bank; isn't that true, isn't that his duty?

Mr. Donohue: It is his duty.

Judge Keefe: And that is his sole duty, as I see it.

[fol. 27] Mr. Donohue: Yes, your Honor. That is to say, he does not make his own investigation of the buying rates. He takes the rates certified to him.

Now, when he makes public a rate that is the rate; and if he makes public the rate in the form prescribed by statute that is the rate which is not subject to judicial review. That is what the courts have held.

Plaintiff's opening argument presents this proposition that in all of the cases which we have cited there was more than a motion to dismiss. There was a presentation of the case on the merits.

Whether or not that is so, and assuming that in most of the cases that was so, nevertheless, the court held that the particular question here presented was not subject to judicial review.

Those holdings mean something. They are a precedent which this court is obliged to observe and which this court in the proper discharge of its duties should follow. They are not merely there to indicate that because in 1874 the Supreme Court heard a case and made this finding that again this court shall hear the case only to find that the matter presented is not subject to judicial review; and in fact, our appellate court in the Clarke case—one of the cases cited in our brief—made mention of the failure of the Government to raise the question of jurisdiction. I read from 17 Court of Customs Appeals, 422:

"No question of jurisdiction was raised upon the trial before the Customs Court, and that tribunal passed upon the case and overruled the protest.

"In this court the Government for the first time raises the question of jurisdiction and insists that the action of the Secretary of the Treasury pursuant to section 25 of the Tariff Act of 1894 is not reviewable by the United States Customs Court * * *. It seems proper that the jurisdictional question should receive first attention."

The jurisdictional question was then decided.

Judge Keefe: How may the jurisdictional question be raised? Not only by a motion to dismiss which is clearly in the old practice, the demurrer, which admits the true statement of facts of the petition. Isn't that true? Can it not also be raised by an objection to the admission of testimony, which would really be to the same effect?

Mr. Donohue: Yes, your Honor; but I suggest that we should do first things first; and if this question presented in this protest is not subject to judicial review then the

court should not hear the case merely to make a finding which could be determined on motion.

The plaintiff has argued that if the Secretary refused to publish a rate then he stated that this court would have the power to correct the matter. Those were his words, as nearly as I can remember them. But this court has held, itself, in the case of *Dyer* vs. *United States*, quite to the [fol. 28] contrary. The court states as follows—this was an opinion by Judge Evans, if I recall correctly:

"The power of this court is limited by the statute, and nowhere in the statute do we find authority to compel the Secretary of the Treasury to proclaim a rate of conversion."

Judge Keefe: Is that in the yuan dollar case—Mexican dollar?

Mr. Donohue: Mexican dollar; yes, your Honor.

Judge Keefe: And all the decisions you have cited were prior to that case, because that case is since I came here.

Mr. Donohue: Yes, your Honor; but that case does not raise the real question which the importer here seeks to have reviewed, and the finding which I refer to here is on another point, but it is a finding to the effect that where the Secretary has refused to publish a value this court does not consider that it has any power by statute to compel him to publish such value.

Now the importer thinks otherwise; but there is a previous holding of this court.

Judge Ekwall: Suppose, for the sake of argument, that the Federal Reserve Bank certified two rates, and the Secretary of the Treasury didn't publish either one of them, just remained inactive about the matter; and the Collector of Customs went ahead and used his own discretion, and chose the official rate, we will say, in this case, rather than the free rate. Wouldn't we have something to say about whether he—or to review his actions?

Mr. Donohue: Oh, yes, your Honor. That is to say, would you have the power to review the action of the Collector of Customs to ascertain whether or not he had used the rate provided by statute? Certainly the court would have power to review that question. But suppose the Secretary——

Judge Keefe: Isn't that the very question that is before us right today, whether we have the right and the power to hear these cases and determine that very fact?

Mr. Donohue: No, your Honor. It is conceded on the——

Judge Keefe: I disagree with you.

Mr. Donohue: That is your Honor's unquestioned prerogative. But it is conceded on the papers in this case that the rate published was the rate used by the collector.

It is conceded on the papers that—when I say conceded I mean it is unquestionable from the papers—that the rate certified was the rate published.

It is alleged that because two rates were certified and only one was published that this court can review the power of the Secretary or the act of the collector in refusing to employ the other rate.

Judge Keefe: Have you finished, gentlemen?

Mr. Donohue: Yes, your Honor. Thank you.

[fol. 29] Mr. Colburn: I have nothing more to add, your Honor.

DENIAL OF MOTION TO DISMISS

Judge Cline: The court unanimously agrees that it has jurisdiction to decide this question; to hear the matter, at least.

We deny the motion to dismiss unanimously; and we would like to have the case set down for hearing, if counsel can be ready—on the merits, I mean—this term of the court. Can you be ready to try your case?

Mr. Colburn: I can be ready, your Honor.

Mr. Donohue: Your Honor, I can not be ready.

Judge Cline: That will hold it over, of course, until next fall. This is the last term of the court when all of the members will be here to hear the case.

Mr. Donohue: I regret that that is necessary, but for one thing, we have a witness who is out of the country, whose testimony we consider important to the presentation of the case. He is in Ecuador, and he cannot be here in June. We feel reasonably certain that he will be here in October.

Judge Cline: All right.

Mr. Colburn: I think counsel has had ample time to prepare this case, your Honor. The case has been pending before this court for a long period of time. I fail to see where the court is going to be enlightened to any great extent by testimony.

Judge Ekwall: I was wondering whether possibly you couldn't agree upon stipulating that if this witness were present he would testify thus and so and possibly obviate the necessity of his being here.

Mr. Colburn: Of course, I have no present knowledge who he is or what he might testify to.

Judge Ekwall: I understand, but I am just giving you the suggestion.

Mr. Colburn: I would be glad to attempt that, but I would seriously suggest to this court that this case has been pending a sufficient length of time; before this motion was ever presented the facts relevant to it were fully discussed with counsel for the United States.

A proposed stipulation was submitted. Counsel refused to sign it, and filed this motion to dismiss. I don't feel that there is anything that can enlighten the court on this controversy that can't be supplied by public record, either by the Federal Reserve Bank or by the published Treasury decisions, or some other such record that is now available.

Mr. Donohue: Your Honor, I take it that without question we would have the right to present the case as we best saw fit. I believe that Mr. Colburn is sincere in his belief as to what is necessary for the presentation of the case, but if we differ, if we feel that evidence should be presented the court is setting the case down so that evidence may be presented, and we are not interested in delaying the case [fol. 30] merely for the sake of the delay. This is an important case. There are a great number of protests suspended pending the decision of this case, and it would serve no purpose to compel the Government to proceed before it was ready.

Mr. Colburn: May I ask the court to inquire what the witness would testify to? Perhaps pursuant to his Honor, Judge Ekwall's suggestion, it can be covered. I don't know.

Judge Keefe: Maybe you can get together on a stipulation. If you can——

Judge Cline: Are you asking for the continuance solely for the testimony of this one witness, Mr. Donohue?

Mr. Donohue: No, your Honor. I am asking for the continuance because, frankly, the case is not in proper shape for presentation as a whole.

We submitted our motion and submitted our brief in support of the motion, believing that the usual custom would be followed of giving us ample time to prepare.

Judge Ekwail: Well, I understood from your argument there wasn't any matter of fact so far as you could see to be presented. It was all a question——

Mr. Donohue: Yes, your Honor.

Judge Ekwall: Then, why do you have to have 2 or 3 months' time to present your case?

Mr. Donohue: I think perhaps we could be ready in less time than that, but the proposition is either to be ready within 2 weeks or not until the court convenes in October, and we cannot be ready in 2 weeks.

(Further discussion at this point off the record, by order of Judge Keefe.)

Judge Cline: It will go to October.

Mr. Donohue: Your Honor, I don't know whether I noted on the record an exception to your Honors' ruling.

Judg Cline: Exception to the Government.

In United States Customs Court, Third Division

John Babb, Plaintiff,

vs.

The United States, Defendant

Protest No. 57467-K

New York, N. Y., September 30, 1942.

Before Judge Cline, Judge Keefe, Judge Ekwall

Appearances:

Straus & Hedges, Esquires, and Barnes, Richardson & Colburn, Esquires, as associate counsel, for the plaintiff, by [fol. 31] J. Bradley Colburn, Esquire, of counsel. Paul P. Rao, Esquire, Assistant Attorney General, for the defendant, by Joseph F. Donohue, Esquire, special attorney, of counsel.

Mr. Colburn: May it please the court, at the outset, may I informally expressed our appreciation to the court—and I am sure counsel for the Government joins me—for their consideration and courtesy in granting us this special hearing.

Judge Cline: We are very glad to do it.

Mr. Donohue: The Government joins in that

Mr. Colburn: The case before the court this morning is the same as that heard by the court in June. At that time, upon a motion by the Government to dismiss the protest, on the alleged ground that this court had no jurisdiction to hear it, briefs were filed, the case was argued before the court, and after due deliberation the motion was denied.

We are here this morning to hear this case upon its merits.

I would like, if I may, to make a short statement outlining the history of the case and the facts, at the conclusion of which I propose to present to the court a stipulation of the facts, upon which counsel have labored long over the summer and have finally gotten together.

The merchandise in this case consists of certain woolens imported from Great Britain, classified under Paragraph 1109 of the Tariff Act of 1930.

There is no dispute here, and no claim is made with respect to that classification. The sole issue sought to be raised by the protest, and which we here present to the court, is with respect to the alleged error committed by the Collector of Customs in converting the currency of the invoice, pounds sterling, into United States money, for the purpose of assessment and collection of duties, under Section 522 of the Tariff Act.

This merchandise was exported from England on May 3, 1940. On that particular day the Federal Reserve Bank, which, as this court is well aware, is the fact-finding body designated by the Congress, under Section 522 (c), to determine buying rates of exchange, found and certified to the Secretary of the Treasury two buying rates for the pound sterling; one of those rates it denoted "free" and one of them it denoted "official."

At the time, or just prior to that certification of two rates, the Federal Reserve Bank had notified the Secretary of the Treasury of its intention to do so, because always, up until

a certain time, the Federal Reserve Bank had certified only one buying rate for the pound sterling.

In its communication to the Secretary, explaining the proposed change, the Federal Reserve Bank stated that it is an outgrowth of the control instituted by the government of the United Kingdom over its currency. The Government of the United Kingdom was to require, beginning March [fol. 32] 25, 1940, that certain classes of commodities—whiskey, tin, rubber, furs, and jute (manufacture of jute I consider in the same class)—when exported from the United Kingdom to the United States could only be given an export permit when it was established to the satisfaction of the Customs officers of the United Kingdom that payment for such five classes of goods had been or would be within a prescribed period of time paid either with United States dollars or with pounds sterling that had been obtained in the United Kingdom from the Bank of England or one of the Bank of England's agents, which they call authorized dealers—and this court will probably hear that expression "authorized dealers"; they were agents of the Bank of England—at a fixed rate of exchange, a rate of exchange fixed and set by the British Treasury. It never fluctuated, was the same always. "And," said the Federal Reserve Bank, "because of that requirement of the British government with respect to these five classes of goods, beginning on the effective day of that regulation, March 25, 1940, we will begin to certify for the first time rates for the pound sterling, first, this fixed or this rate fixed by the British Treasury of which pound sterling had to be obtained in payment for these certain classes of goods, which we will call the official rate"—"official" meaning, not denoting any official action of the United States Government or any agent thereof, but "official" meaning the British official action; "and we will continue to certify as we have always previously done the rate of exchange for the pound sterling obtained by cable transfer in the New York market, which we will call the free rate."

Now, what went on after that advice by the Federal Reserve Bank we are not informed, except, as it appears from the published Treasury Decisions, the Secretary of the Treasury issued instructions to Collectors of Customs that the Federal Reserve Bank was going to certify these two things, but that he, the Secretary, would permit to be published in the Treasury Decisions only the one official rate;

and the Collectors of Customs in converting pounds sterling of any invoice into United States money would use only that rate, not for the five classes of goods that were required by the British government to be paid for in such currency but for all merchandise imported into the United States from Great Britain.

So, the Collector of Customs at New York, in the case at bar, converted the pounds sterling on the invoice at the so-called official rate.

Protest here challenges that action. It is based upon the proposition that we say the collector committed error in converting the currency of this invoice at the official rate. We say that for the purposes of Section 522 he should have used the buying rate in the New York market for cable transfer, which was, of course, the free rate.

[fol. 33] In support of that protest it is the plaintiff's position that the statute, Section 522 (c)—and there is no dispute between the parties as to the fact that the buying rate is the proper rate to be used for conversion purposes, differing whether it be the official or the free, both differ by more than 5 percent from the proclaimed value—that when the statute in Section 522 (c) designates the Federal Reserve Bank as the fact-finding body to determine a buying rate in the New York market for cable transfer, in this case of the pound sterling, that the Federal Reserve Bank, being the fact-finding body so designated by the Congress, its findings are absolutely conclusive and binding on everyone. They are binding on this importer; they are binding on the Collector of Customs; they are binding on the Secretary of the Treasury.

We say that in the case at bar the Secretary of the Treasury, by his attempted suppression of the rate of exchange called free, has violated the statute. We say that the Secretary has no such authority; that when the Congress said to the Secretary he might make public the rates determined and certified by the Federal Reserve Bank, that was a very limited ministerial function, which cannot be broadened into an alleged grant of a power to determine for himself the proper rate of exchange. We say that is what the Secretary has tried to do in this case—the Collector carrying out the Secretary's instructions has done.

So, the plaintiff claims here that the merchandise at bar was bought and paid for with pounds sterling obtained at

the free rate by cable transfer in the New York market; that for the purposes of this statute those are a type or kind of currency; that there is, there has been, proclaimed by the only fact-finding body designated by the Congress to make such determination a buying rate of exchange for that type or kind of currency; that that is the only question before this court—did the Collector commit error in not using that buying rate of exchange so certified for goods which were purchase with that type of currency?

Now, counsel have, as I stated at the outset, agreed upon a stipulation of the most of the facts which we have deemed relevant to this controversy.

We propose this morning, subject to the approval of the court, to file that stipulation, together with certain exhibits therein referred to, which exhibits we ask be marked in evidence herein; that that be received as presented. The plaintiff will then rest. Counsel for the Government, I understand, will then desire to present the testimony of several witnesses upon one or two points which I suppose he would rather state to the court.

It is understood, further, that if at the conclusion of the hearing, subject to the further approval of the court, there is any need for rebuttal of any evidence which counsel for the Government may succeed in getting into the record, [fol. 34] that if I find it necessary I may request time, and counsel for the Government will make no objection to further continuance. Is that correct?

Mr. Donohue: The agreement as to the procedure is as Mr. Colburn has stated.

OFFERS IN EVIDENCE

Mr. Colburn: I offer at this time a stipulation entered into by counsel, together with the supporting exhibits; and may I state to the court that copies of this were presented to each member of the bench, and we have made one slight change in it since that time, to do away with, in paragraph 9 of the stipulation, which refers to a T. D., published T. D. In the form as the members of the court have the stipulation, it had provided for a copy of that T. D. being attached and marked in evidence. We have agreed that that is wholly unnecessary and have striken out the words beginning "a true copy of which is attached hereto." So that that T. D. will no longer be in evidence. That is the only change.

Mr. Donohue: Now, it was agreed between counsel that the presentation of this stipulation at this point did not constitute a waiver of the position heretofore taken by the Government, to wit, that this case presents a cause of action not subject to review by this tribunal; and therefore, while Mr. Colburn and I have agreed that the facts stated in this stipulation are facts, the Government has not agreed that these facts are relevant, and I now wish to object to the stipulation on the ground that it is irrelevant. That was our agreement.

Mr. Colburn: Yes; irrelevant because you still insist the court has no jurisdiction of the whole subject matter. Is that right?

Mr. Donohue: That is the point that I am making now; that, and only that.

We have heretofore argued that the matter presented by this protest involves a review of the action of the Secretary of the Treasury and that the executive action of the Secretary of the Treasury is not subject to judicial review.

At this point I do not wish to analyze the stipulation for the facts which it contains. I merely seek a ruling of the court to my objection to the stipulation.

I object to it on the ground that it is irrelevant, in that this court has no jurisdiction of the subject matter of the suit.

Judge Ekwall: Objection is overruled, and it will be received.

Mr. Donohue: Exception, please.

We have agreed that the exhibits attached hereto may be marked as exhibits in the case in the manner suggested by——

Mr. Colburn: It is a matter of procedure how the stipulation shall be treated, if the court please. May it be marked as an exhibit? I just want to be sure it is a part of the factual record, that is all.

Judge Ekwall: I think it will just be filed as a stipulation. [fol. 35] Mr. Colburn: And the exhibits filed with the stipulation, as a part of it?

Judge Keefe: It would have the same effect as if they were offered orally.

Mr. Colburn: Yes.

Judge Keefe: I see your point, Mr. Donohue. You desire these various exhibits marked in accordance with the stipulation; that is, one, two, or whatever they are.

Mr. Donohue: Yes, your Honor.

Judge Keefe: I think the Clerk will have to arrange that. I think it is agreeable to the court that they be arranged in sequence in accordance with the stipulation.

Mr. Colburn: Here now, arranged in that order.

Judge Keefe: Are they also marked?

Mr. Colburn: They are not marked, but they are arranged in the order in which they occure in the stipulation.

Judge Keefe: It seems to me they should be marked so that they will be referred to by numbers or letters.

Judge Ekwall: Exactly as set forth in the stipulation. The point has been raised that each exhibit should be offered seriatim, I suppose so that there will be a record of their having been received in evidence, so as to support the stipulation.

Mr. Colburn: At this time, if the court please, I offer, and ask they be marked in evidence, the following exhibits referred to in the stipulation filed with the court: Statutory Rules and Orders 1939 No. 1067, referred to in paragraph 3 of the stipulation. I ask it be marked as "Exhibit 1."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 1" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statutory Rules and Orders 1939 No. 1251, referred to in paragraph 3 of the stipulation, I ask be received and marked as "Exhibit 2."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 2" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statutory Rules and Orders 1939, No. 1620, referred to in paragraph 3 of the stipulation, I ask be received and marked "Exhibit 3."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 3" in Protest No. 57467-K, as of this date.)

[fol. 36] Mr. Colburn: Statutory Rules and Orders 1940, No. 291, referred to in paragraph 4 of the stipulation, I ask be received and marked as "Exhibit 4."

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Exhibit 4" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statutory Rules and Orders 1940, No. 892, and No. 894, both referred to in paragraph 5 of the stipulation, I ask be received in evidence and collectively marked "Exhibit 5."

Judge Ekwall: They will be received and marked.

(The documents referred to were received in evidence and marked "Collective Exhibit 5" in Protest No. 57467-K, as of this date.)

Mr. Colburn: A copy of a letter from the Federal Reserve Bank, addressed to the Secretary of the Treasury, under date of March 19, 1940, referred to in paragraph 7 of the stipulation, I ask be received and marked "Exhibit 6."

Judge Ekwall: It will be received and marked.

(The letter referred to was received in evidence and marked "Exhibit 6" in Protest No. 57467-K, as of this date.)

Mr. Colburn: Statement by the Federal Reserve Bank of the buying rates of exchange certified to the Secretary of the Treasury, under Section 522 (c), for May 3, 1940, referred to in paragraph 8 of the stipulation, I ask be received and marked as "Exhibit 7."

Judge Ekwall: It may be received and marked.

(The document referred to was received in evidence and marked "Exhibit 7" in Protest No. 57467-K, as of this date.)

Mr. Donohue: If the court please, I have not made individual objections to these exhibits, but I take it that my objection to the stipulation as an entirety will be deemed to include and cover objections.

Judge Ekwall: Let the record show that that will be the understanding.

Mr. Colburn: Circular of the Customs Information Exchange, dated May 3, 1940, setting forth the buying rates

of exchange certificates by the Federal Reserve Bank to the Secretary of the Treasury, under Section 522 (c), referred to in paragraph 11 of the stipulation, I ask be received and marked "Exhibit 8."

Judge Ekwall: It will be received and so marked.

(The circular referred to was received in evidence and marked "Exhibit 8" in Protest No. 57467-K, as of this date.)

Mr. Colburn: The plaintiff rests.

ARGUMENT ON MOTION TO DISMISS

Mr. Donohue: The Government wishes to be heard on a motion to dismiss this protest, on the ground that the pleadings and the facts introduced show that the only question presented and the only question which can be considered under the protest is one that is not subject to judicial review.

[fol. 37]

I think it will not be disputed that if the only question presented by this protest and the only question which the court can determine under the facts in this case involves a review of a discretionary act of the Secretary of the Treasury, which act the Secretary is specifically empowered by statute to make, then this court will not review that act.

I think if one thing is settled by the cases which have heretofore been submitted in supported of the Government's motion to dismiss, it is that the executive act of the Secretary in determining the value of money is not subject to judicial review.

The question which apparently is in the court's mind is whether or not the case here presented involves a review of the Secretary's action in discretionary matter or a review of the action of the Collector. If it is the Collector's action, we concede that this court has jurisdiction. If it is the Secretary's action, we submit that the cause presented is not subject to review in this or any other judicial tribunal.

The case which is presented to the court must be presented within the scope of the pleadings and the facts. Nothing else can be considered. The only facts here are those submitted in the stipulation. The stipulation may be briefly described as follows:

Paragraph 1 describes the merchandise.

Paragraph 2 states that the merchandise was purchased in Great Britain at invoice prices in pounds sterling.

Paragraphs 3, 4, and 5 incorporate by reference certain British Orders in Council.

Paragraph 6 states that up to March 25, 1940, the Federal Reserve Bank certified to the Secretary of the Treasury one buying rate for the pound sterling.

Paragraph 7 incorporates a letter written by the vice president of the Federal Reserve to the Secretary of the Treasury, stating that on and after March 25th two rates would be certified.

Paragraph 8 states that two rates were certified in the manner indicated in the letter.

Paragraph 9 gives the proclaimed rate for the quarter in question.

Paragraph 10 states that the pounds used to purchase the instant merchandise were bought at $3.21, and that on the same day pounds were certified by the Federal Reserve Bank as having been sold on the New York market at $3.227, which pounds were designated as free, and on the same day the Federal Reserved Bank certified pounds were sold on the New York market at $4.035, which rate was designated as official rate.

[fol. 38] Paragraph 11 states that the two rates certified by the Federal Reserve Bank were circularized to the Customs Information Exchange.

Now, on that statement of facts and on the pleadings, which state merely that the Collector should use the rate of exchange described by Section 522 (c), issued is here joined. So there can be no question about the Collector disregarding the advice of the Secretary and using a rate which was not published.

The question is whether the Collector was correct in using the rate which was found by Federal Reserve, certified to the Secretary of the Treasury, and published by the Secretary in the manner prescribed by Section 522 (c).

It seems that the plaintiff can proceed on one of three possible theories. He must state (1) that there were two rates or two different currencies (2) that the rate used by the Collector did not exist in the New York market; or (3) that two rates existed in the New York market for one currency, and that the Secretary directed the use of a wrong rate.

Now, as to the first premise that two rates were certified and that two currencies existed, the court can judicially notice that there is one currency in circulation in Great Britain, and that is the British pound. If that is not the fact, certainly evidence thereof should be included in plaintiff's submission of facts and there is no evidence here that there are two types or kinds of currency in circulation in the United Kingdom. That fact should be definitely established. It cannot be left to interference to an interpretation of the British Orders in Council. Either there is one currency in Great Britain or there are two.

We say that the facts in the stipulation do not change the facts which this court can judicially notice; that is, that there is one currency.

We say, moreover, that there is affirmative evidence in the stipulation establishing that there is only one currency, and that there was at all times relevant to the instant controversy only one currency in circulation in Great Britain, and that evidence is in Exhibit 6, the letter of the Federal Reserve Bank to the Secretary of the Treasury, wherein it is stated:

"In view of the foregoing, we shall, commencing Monday, March 25, 1940, certify to the Secretary of the Treasury, pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the pound sterling."

The pound sterling is one currency. Two rates were certified, not for two currencies but for one currency, and that currency is the pound sterling.

[fol. 39] Consequently, the first premise on which plaintiff could proceed to a judicial review fails for lack of factual support. The evidence here shows that there was one currency in circulation in Great Britain, and that currency was the pound sterling. It cannot be, therefore, that two rates were certified for two currencies and that the rate applicable to the wrong currency was used. That premise must be eliminated.

The second premise is that the rate used by the Collector did not exist in the New York market.

We submit that the facts as now before the court establish clearly on their face an admission by the plaintiff that the rate used by the Collector did exist in the New York market.

The importer has stated that it will not go behind the certification of the Federal Reserve Bank. The Federal Reserve Bank, stating that it acted under Section 522 (c), has certified the rate that was here used. The legal presumption arising from that is that the rate used existed in the New York market, and counsel for plaintiff has stated that all parties, including this court, are bound by that certification. Consequently, it cannot be, under the pleadings as before the court and the facts in the case, that the rate used was a nonexistent rate.

The third premise upon which plaintiff may proceed is that two rates existed in the New York market for one currency, and the Secretary directed the use of the wrong rate.

Now, if two rates existed, it is clear, and I think it has been asserted by counsel for plaintiff in his previous argument addressed to the motion, that the statute contemplates only one rate shall be used. Someone must select that rate. If it were the obligation of the Collector to select that rate, presumably the statute would require that the certification be delivered to the Collector. But the statute specifically states that the rate shall be certified to the Secretary of the Treasury, who shall publish it to the extent that he deems necessary.

The statutory procedure, therefore, does not contemplate that the rate shall be delivered to the Collector of Customs at all. It contemplates that it shall be certified to the Secretary of the Treasury and published by him.

It may be asserted that the Federal Reserve Bank is authorized to certify one rate only. That position cannot be maintained by plaintiff here, because the plaintiff has disallowed any intention to go behind the certification by the Secretary. Consequently, the certification must be accepted.

The question which this court is to determine, then, is who makes the choice—is it this court, is it the Collector of Customs, is it the importer, or it is the Secretary?

[fol. 40] The statute says that the Secretary shall publish the rate. There is no statutory authority, no judicial precedent, no case holding that the rate certified by the Federal Reserve Bank shall be selected by the Collector. The selection and determination of a rate of exchange, we have heretofore argued in our motion to dismiss, is inher-

ently an executive matter. In historical background it is a legislative matter, and the authority is as ancient as the Constitution of the United States.

Article I, Section 8, Clause 5 of the Constitution, enumerating the powers of Congress, states that Congress shall have the power "to coin money, regulate the value thereof and of foreign coin." The Constitutional source of the power to regulate the value of foreign coin, therefore, places that power in Congress. Congress has delegated it to the Secretary of the Treasury.

The rate used here is the rate published by the Secretary of the Treasury. I will not attempt to quote the opening argument of counsel for plaintiff this morning, but as I understood him, he is asserting that the Secretary of the Treasury has suppressed the buying rate which is applicable to the instant merchandise, and that the Secretary of the Treasury had no authority to suppress such rate.

There is the issue presented by plaintiff. Consequently, this court, in the last analysis, is presented with the question to review the action of the Secretary of the Treasury. If there is one thing we submit, which is settled it is that this court will not entertain a question involving a review of the discretionary action of a Cabinet officer. Consequently, the Government renews its motion to dismiss the protest, asserting as we have from the very outset, that it presents a cause of action which is not subject to judicial review.

The possible uncertainty which may have been raised at the outset when the motion was presented because the plaintiff's case was not in has now been removed. The evidence is before the court. The pleadings are before the court. Only from the evidence and the pleadings can this court determine what is the case which it is to decide. That case, we submit, involves a review of the action of the Secretary of the Treasury, and nothing else.

We, therefore, submit that the protest should be dismissed.

Mr. Colburn: Does the court desire to hear me in answer to my friend's men of straw?

Counsel has enjoyed listening to the recital. He set up quite an army of straw, which he has successfully, or it would appear has successfully, demolished. I fail to see

where trotting out this array he has yet put his finger on the issue presented by the plaintiff.

Counsel for the United States would have this court apparently believe that the Secretary of the Treasury stands out above all things and all men and all statutes as the [fol. 41] Secretary of the Treasury who has been endowed with power, irreviewable power in a case of this character. It isn't so.

I agree with one thing and one thing only my friend has said when he referred to the Constitutional ground of power residing in Congress. I don't think any one can question that. And Congress in its wisdom, in various stages of the legislation dealing with currency matters, originally said foreign coin shall be valued at so much, and they fixed it in figures in the law.

Then that was a little bit too rigid to stand, apparently, and they, some years later, provided that the Director of the Mint should find the value of foreign coins, the metal value of foreign coins in terms of the United States money.

Judge Ekwall: May I ask you to restate that first proposition there?

Mr. Colburn: I said that I agreed with counsel for the Government in his statement that the original and only possession of this power with respect to the determination of values of foreign money and currency resided in the Congress.

Judge Ekwall: Yes; right after that.

Mr. Colburn: And I said that Congress in its wisdom had originally, by statute, prescribed the value of foreign coins in terms of their metal value in figures. In other words, they said the pound sterling shall be valued at four eight six six, or whatever it is. After that they by statute said the Director of the Mint should determine the metal value of foreign coins and that that determination by the Director of the Mint should be proclaimed by the Secretary of the Treasury.

Along some time there there was also a provision which was incorporated in the revised statutes that the President might by regulation prescribe the standard for estimating the duties where merchandise was imported in a depreciated currency.

Later those several statutes were supplanted by Section 25 of the Act of 1894, which provided that the value of for-

eign coin, as expressed in money of the kind of the United States, should be estimated by the Director of the Mint, and proclaimed by the Secretary of the Treasury.

Our Court of Appeals, in the *Staedtler* case, affirming the action by this court—that case is reported in 25th volume Court of Appeals reports—has said that the function of the Secretary of the Treasury in proclaiming the values of foreign coins, as estimated by the Director of the Mint, is a purely ministerial function.

Now, along with the Act of 1894, providing for the determination by the Director of the Mint, and proclamation of, ministerial proclamation by the Secretary of the Treasury of those values, the Congress enacted into law a proviso that the Secretary of the Treasury—and it is the [fol. 42] only instance of which I am aware, from a careful study of the legislation and history, in which the Secretary had been invested with power by the Congress—that the Secretary might order reliquidation of any entry whenever satisfactory evidence had been produced to him showing that the value of foreign money in the United States currency was at least 10 per cent, more or less, than the value proclaimed, based upon the estimate of the Director of the Mint.

Now, in the Emergency Tariff Act of 1921 that statute was, so far as the determination by the Director of the Mint and the proclamation by the Secretary of the Treasury, carried forward. But, the proviso whereby Congress had given the Secretary of the Treasury direct power for the first and only time, was repealed, Congress supplanted that provision with a provision that buying rates of exchange should be determined by the Federal Reserve Bank and certified to the Secretary of the Treasury, and not proclaimed by the Secretary of the Treasury, which our Court of Appeals said was ministerial, but made public to such extent as the Secretary might deem necessary.

I say it entirely begs this issue to say that the actual conversion of the money of an invoice was not the act of the Collector, but was the action of the Secretary of the Treasury.

I don't for one moment suppose this court with its knowledge of administrative procedure would think such a thing was possible. It is not an executive act—I think it was called an executive act of the Secretary and not subject

to review. I think Congress acted deliberately and advisedly when it repealed the provision, the proviso to the Act of 1894, whereby they invested the Secretary of the Treasury with direct authority to make findings respecting the value of foreign currency and enacted in its stead a provision giving to the Federal Reserve Bank such, the authority to determine foreign exchange rates, and they gave that to the Federal Reserve Bank within rather well-defined limits. They set forth in the statute what they meant when they said buying rates of exchange.

Now I think it amounts to effrontery to say that the limited authorization given to the Secretary of the Treasury to make that determination public amounts to an executive act of a Cabinet officer, which this court dare not inquire into.

In the previous argument of this case the question was raised if there had been only one buying rate certified by the Federal Reserve Bank the Secretary of the Treasury chose not to make that public, and the Collector then converted on the proclaimed rate for the currency.

I suggested to this court that that would be an instance where I think everyone would agree it was an utter abuse [fol. 43] of power and necessarily reviewable by this tribunal. If that be so I say that it amounts to the same thing when there are two rates, and in the final analysis it matters not a great deal whether there are rates for two different kinds of currency or there are two rates which serve or must be used for different things. In the legal analysis I think they are the same. Where there are two of those things found by the Federal Reserve Bank and the Secretary elects not to make public, at least not to publish in the Treasury Decisions one of those rates and then says, "Oh, you can't do anything about it, you must take only the other rate"; there is no such statutory authority vested in the Secretary.

Now this question of plaintiff not having made a case—also, if I may, before leaving the other point, of course, it has been held directly by this court and by the Court of Customs Appeals, in one case at least, the *Parkhurst* case, in 12th volume of Court of Appeals, the court stated in part:

"To preserve the importer's right of protest, therefore, liquidations ordered by the Secretary must be regarded as

decisions of the collector. To hold otherwise would leave the importer remediless against every reliquidation ordered by the Secretary. Reliquidations made by the collector on orders by the Secretary are collectors' decisions; and such liquidations, like any other liquidation made by the collector, may be questioned by protest."

So, even if my friend is right this court has said that they are considered to be actions of the Collector, and necessarily reviewable in this tribunal.

Now, with regard to the plaintiff having failed to make out a case, I don't propose to make any extended statement on this. The court is, I am sure, already familiar with the facts set forth in the stipulation and in the supporting exhibits which have been offered this morning.

Briefly adverting to them, the first three Orders in Council are something that the Government desired to put before this court. In my view they don't affect the situation at all. They relate to some internal control of the economy in Great Britain. If they are material they are material only insofar as by one provision of such regulations they show that pound sterling in the United Kingdom had to be purchased when conversion was made of foreign currency at a rate fixed by the British Treasury. There was no longer any free and open market in the United Kingdom.

Of course, this court has said that in the consideration of our statutes the administrative construction and enforcement of the laws of the United States, those charged [fol. 44] with the duty of such administrative construction and enforcement must be guided by the laws of the United States, rather than by the statutes of a foreign country. That is in T. D. 47931, the *Amalgamated Textile* case.

Right there I pause to say that, of course, the statute, Section 522 (c), doesn't say the value of the British pound in the United Kingdom. When it talks about a buying rate of exchange Congress said "in the New York market for cable transfer."

The stipulation says that the merchandise at bar was paid for with pounds sterling purchased in the New York market for cable transfer. If pounds certified by the Federal Reserve Bank as that bank has said in its letter and as is shown by these other regulations, could only be ob-

tained in the United Kingdom and at a fixed rate, to wit, four naught three five, and if the merchandise at bar was bought and paid for with pounds sterling purchased in the New York market for cable transfer, and not at four naught three five but at three two one, I submit it is an irresistible conclusion to be drawn they are not the kind of pounds called official that the British regulations talk about and the Federal Reserve Bank certified under the rate for an official pound.

Those regulations—first let me say that another paragraph here dealing with the regulation that became effective on March 25th, that regulation of the British Government is material here only insofar as it throws light upon what the Federal Reserve Bank was doing when it for the first time, so far as I know, in the history certified two rates for the British pound sterling.

The Federal Reserve Bank in its letter refers to certain regulations of the British Government going into effect on March 25th and requiring payment for certain commodities by a certain kind of pound. "Therefore," says the Federal Reserve Bank, "beginning on the effective date of that regulation we will certify rates for both those things: one official and one free."

It is an interesting thing if there are two rates for one and the same kind of currency one would suppose that there would only be necessity for continuing to certify them, so long as they were different or so long as they had some different application. I don't suppose the court would indulge a presumption that the Federal Reserve Bank does a vain and useless thing.

Today, as this court may, I suppose, judicially notice, on the authorities presented by counsel for the Government, the free pound is four naught three five and the official pound is four naught three five, and that statement of facts has obtained for some time long last past.

If they were one and the same thing, why do that? I submit that the only thing this court can find on the state [fol. 45] of facts here presented is that this official pound, whether you call it an official rate for the pound sterling, and when you got back to England if you bought one at four naught three five and you bought one at three four seven, and here in New York, in the United States, one was called official and one was called free, you went back to

England and when you got there—even there, though, you couldn't use it for the same purpose. I was about to say they had the same value, but they don't, because when you get back to England with those pounds the one that you paid for at the free rate at the time of this case you couldn't use if you wanted to buy whiskey, tin, rubber, furs, or jute. That was the pound you used, however, when you wanted to buy woolens, and it was the pound that was used when this importer bought woolens.

So I say that what may be true in the United Kingdom I don't think this court is particularly concerned with, except and only as it may shed light upon what the Federal Reserve Bank meant when it certified these two things.

The fact, if it be a fact, that there was in the United Kingdom only one pound sterling is wholly immaterial, in our view, because Congress said, in Section 522, "we will judge foreign currency by what is done in the New York market for cable transfer"; and if the Federal Reserve Bank in seeking the value of foreign currency in the New York market for cable transfer found two things in so far as Great Britain was concerned—found one thing they called official and found another thing they call free—it is our basis of our case that those two things had different uses; the official pound used for the exportation payment for whiskey, tin, rubber, furs and jute exported from Great Britain to the United States, the free pound for all other merchandise exported to the United States.

The merchandise at bar being of the class of the "all other merchandise" was improperly converted on the basis of the currency in which it was paid; and that is what we ask this court to hold.

DENIAL OF MOTION TO DISMISS

Judge Ekwall: The motion to dismiss will be denied.

Mr. Donohue: Exception, please.

Judge Ekwall: Exception allowed.

Mr. Donohue: I wish to state at the outset, if the court please, that in presenting our testimony supporting our case we do not, of course, waive the position that we have heretofore taken. We still insist that the question presented is not subject to judicial review. We present the evidence only because our motion has been overruled.

When we presented briefs supporting our first motion we incorporated a photostatic copy of a letter written by the Ambassador of Great Britain to the Secretary of State of the United States, together with photostatic copies of certifications from the Secretary of State to the Secre- [fol. 46] tary of the Treasury, and an original certification from the Secretary of the Treasury stating that these were copies of letters on file in the State Department.

Of course, the Ambassador from Great Britain is not subject to subpoena. The record which I have here is a record taken from the State Department and the Treasury Department. I believe that the matter is subject to judicial notice. In order to remove any doubt on the matter, however, I offer in evidence the letter from Lord Halifax to the Secretary of State, together with the certification showing that it is a true and correct copy of the letter.

Mr. Colburn: Objected to, of course. In the first place, I think it is wholly incompetent and immaterial. I think it constitutes a first effort to go behind the certification of rates by the Federal Reserve Bank. I think it is palpably hearsay. It is an incomplete record.

I will take up the first ground. When the motion to dismiss this case was first presented to this court the United States filed a voluminous printed brief, citing many, many cases in support of its alleged support of its motion. I stated at the argument of that motion, and I restate now, that those cases are informative and interesting to this court only insofar as they establish the principle that a determination of the rates of exchange or the values of currency by the properly designated fact-finding tribunal designated by Congress is final and conclusive on everyone, and not subject to review.

I say that you draw a curtain, Congress draws a curtain behind that, and this court nor no other tribunal nor no other Government officer may challenge or go behind that finding.

I will cite the case of *Cramer* vs. *Arthur*, and I will read from the brief of the Government, page 13, where an abstract from that case from the Supreme Court's opinion states:

"That valuation"—meaning a finding of the value of the currency—"so long as it remained unchanged, was bind-

ing on the collector and on importers,—just as binding as if it had been in a permanent statute, like the statute of 1846, for example. Parties"—

and I can't deny—pause to interpolate that that includes the Collector, Secretary, or any other Government officer, as well as the importer—

"Parties cannot be permitted to go behind the proclamation, any more than they would have been permitted to go behind the statute, for the purpose of proving by parol, or by financial quotations in gazettes, that its valuations are inaccurate."

I submit that I might cite numerous other instances of the same tone.

[fol. 47] I submit that the offer of this alleged correspondence between several Government departments and the Ambassador of Great Britain is an effort to go behind the finding, the determination of these rates of exchange by the Federal Reserve Bank; and I submit that the finding of such rates by the Federal Reserve Bank is entitled to all of the sanctity that any determination of the Director of the Mint has been accorded in the long line of decisions by the Supreme Court and this court and the Court of Appeals, with which you are familiar.

Now, that is the main, the basis of my main objection to these papers.

I say, in the second place, they are incompetent, as I say that the Ambassador of Great Britain is not qualified to give any evidence to this court as to what the buying rate of exchange in the New York market for cable transfer for the pound sterling was on May 3, 1940. If anybody was competent, if evidence of this character is competent at all I submit it could only be presented to this court through someone who had actual knowledge of this situation; not through a diplomatic representative of a foreign country.

In the third place I submit this alleged file of papers is incomplete. It consists of a communication after this case had been presented to this court, incidentally, and apparently sought for the purpose of getting a statement to present by means of a letter, rather than by person, to this court, on one of the issues before it, a letter from

the Acting Secretary of the Treasury, the Secretary of State, an acknowledgment of that letter, and then a transmittal of an alleged communication from the Ambassador of Great Britain. There is here no copy of a letter addressed to the Ambassador of Great Britain to which his communication seemed to have been in answer.

I submit on all of those grounds or any one of them these papers are incompetent, and they should not be admitted in evidence.

Mr. Donohue: Does the court care to hear me in reply?

Judge Ekwall: Yes.

Mr. Donohue: I submit, your Honors, we have come to a harmonious understanding of the law but a confusion of the issue when Mr. Colburn quotes the Government's brief in support of his objection to an offer.

I am here willing to agree that the rate which was certified by the Federal Reserve in this case and published by the Secretary of the Treasury and used in the liquidation is the correct rate. So it cannot be I, or the Government, rather, who is going behind the certification of the Federal Reserve. But if that rate is being challenged I submit it is the importer who is going behind the certification of the Federal Reserve, and since the issue is here being [fol. 48] presented we are called upon to support the action which was taken by the Collector, even though we submit it is not subject to judicial review.

So, it becomes important to determine whether or not the rate used in this case was the correct rate, and one of the things that must be determined is whether there was one currency in Great Britain or two, and I submit that the Ambassador from Great Britain is an authority on that subject. He is not subject to subpoena by this court, and a statement from the Ambassador relating to the subject of one or two currencies is relevant to the issue which this court is now hearing.

Judge Ekwall: The objection to the admission of the proposed exhibit will be sustained.

Mr. Donohue: Exception, please.

I will call Mr. Foster.

Judge Ekwall: Is there any dispute on the question of whether there was more than one pound there, one currency?

Mr. Colburn: Well, let me say, your Honor, there can be no dispute to the fact of what the Federal Reserve Bank

certified, because that has been stipulated by the parties.

Judge Ekwall: Of two rates?

Mr. Colburn: Of two rates.

Judge Ekwall: But isn't it your position it is two rates of the same currency?

Mr. Colburn: This is the position, my position on that is simply this, that in the first place I say that that makes the court, being bound by the determination by the Federal Reserve Bank, not being able to go behind that determination of value, as the courts have held many times, that that must necessarily mean that the Federal Reserve Bank found, first, there were for the purposes of exports to the United States two different types or kinds of pounds sterling, yet they had different uses; one, the official one had to be used for the payment of export of five certain commodities—whiskey, tin, rubber, furs and jute; the other one, the free, could be used for everything else, and was not controlled at all by the British Government.

Further in support of that I say that if that be not true—that is my first premise, your Honor—I say even if there be any legal contemplation of two rates for the one, only one currency, nevertheless full force and effect must be given to the action of the Federal Reserve Bank in certifying those two things; and the proof we have presented to the court this morning shows that the pound purchased at the one rate was used for certain things, and the pound purchased at the other rate was used for certain different things, that our merchandise at bar was purchased with the pound certified as free, and we say that is the rate should be used here.

[fol. 49] Mr. Donohue: Now, your Honors, I resubmit my offer, counsel for the plaintiff having removed any question which may have existed as to the premises on which he is proceeding.

It has been clearly stated, as I understand counsel, that one of the premises on which he is proceeding is that there were two types or kinds of currencies in circulation and in effect in the United Kingdom.

Mr. Colburn: That isn't so.

Mr. Donohue: Well, then I will defer and be corrected, because I understand counsel to say that one of the premises on which he was proceeding was that there were two types or kinds of currency.

Mr. Colburn: But not in the United Kingdom. I purposely did not say that. I said at the outset of my statement that we drew a veil behind the finding of the Federal Reserve Bank, and that was final and conclusive under the cases cited by the Government; and I adopt that line of authority and am bound by it; and I say that the Federal Reserve Bank did certify two things; and I say that when you read that action in conjunction with the statute then you are led to one of two conclusions:

First, I submit, you are led to the conclusion that the Federal Reserve Bank's action results in there being for the purposes of construction and application, under Section 522, two types or kinds of pounds sterling.

There were two things that were used for different purposes, alternatively.

Judge Ekwall: Isn't it a fact that there was one pound sterling but two different rates for the pound sterling?

Mr. Colburn: That is one possible inference, your Honor, but they had different purposes, different uses, and I say that if that be true then they both must be given full force and effect.

Now, it is like, your Honors will recall the case you have had with respect to the Mexican and yuan dollar, I believe it was the Bracher case. There, in China, they were exchangeable dollar for dollar, but when they got here you had different certifications by the Feedral Reserve Bank, and this court had directly and passed upon the question directly which of those certifications should have been used by the Collector.

We believe that it is wholly immaterial whether you consider this a free pound and an official pound, and if you get back to England you can use them indiscriminately, if they be the same or they are the same piece of paper. We are not concerned with that. I don't believe this court can inquire into that situation. But you are confronted here with what the Federal Reserve Bank did.

Here is the statute says a buying rate for a currency. Now the Federal Reserve Bank has said pound sterling [fol. 50] free, pound sterling official. Now our position is, your Honors may construe that as being for the purposes of construction of our laws, and that is all we, of course, are concerned with, that there were created by that action of the Federal Reserve Bank two types or kinds of cur-

rency, or you can say, if you disagree with that legal conclusion, there are two rates for the one thing, but each of those rates has vitality, each of those rates has a use and a purpose, and it was meant that they would—official for the payment of certain things; the free for the payment of certain others. In other words, you consider them in the character of in rem things. Each one was tied up with a specific class of merchandise. And then you have the only determination, what is the particular merchandise at bar; which rate is associated with it? But in either contemplation I submit that anything behind that as to the condition in Great Britain is wholly irrelevant.

Judge Ekwall: In other words, let me ask you this: If this had been a shipment of rubber you wouldn't be here?

Mr. Colburn: That is right, your Honor, on my theory.

Judge Ekwall: You do contend that the proper rate was used for rubber, tin, or furs or jute, or whatever the other——

Mr. Colburn: Yes, your Honor.

Judge Ekwall: But this being woolen they didn't use the correct rate?

Mr. Colburn: Yes; and that the Secretary of the Treasury or Collector has no more right to disregard the one rate than we have to disregard the other.

Mr. Donohue: Now, if the court please, whether counsel for the plaintiff asserts that there were two types or kinds of pounds in circulation in Great Britain or whether he asserts that there were two types or kinds of pounds in circulation and leaves the place of the circulation to our imagination I submit is wholly immaterial. Pounds sterling circulate in Great Britain and not elsewhere.

Here cable transfers are purchased, and the statute defines the rate to be used in the conversion, in Section 522 (c), by saying:

"For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted."

So, the procedure is to buy a cable transfer in the United States, payable in the country where the pound circulates. That is where the cable transfer goes.

Now, one of the facts that is relevant here in disputing one of counsel's premises is that there was one pound in circulation in the United Kingdom. That is where the

pound circulates. Now counsel can assert the proposition [fol. 51] half way, and stop as to the place of circulation, but we must establish, if this court is to hear the case, we must establish as our evidence that there was only one pound in circulation in the United Kingdom; and that letter is certainly evidence on that point, and in view of the position which counsel has now stated I resubmit the documents, and offer them in evidence again.

Judge Keefe: Do you contend, Mr. Donohue, that you could admit letters in evidence in a case of this character simply because they were written by a public officer?

Mr. Donohue: No, your Honor. I wouldn't make such an assertion with respect to all——

Judge Keefe: Isn't that what you are trying to do?

Mr. Donohue: No, your Honor. The letter is written by the Ambassador from Great Britain. He is not subject to subpoena. The letter here——

Judge Keefe: Can you produce some law that where a man is not subject to subpoena that we can accept a letter written by him as testimony in a case?

Mr. Donohue: I think I can produce authority for the proposition that certified copies of the files of the State Department and files of the Department of the Treasury are admissible in evidence, and I have here certified copies of those files, and among the documents certified is a letter from the Ambassador from Great Britain.

Now, that letter is admissible because it is from the files of the State Department and because the writer of the letter, not being subject to subpoena, the letter itself is the best evidence available.

Judge Cline: You maintain that the Ambassador is the only person who has knowledge of the facts you seek to prove?

Mr. Donohue: No, your Honor. I have a witness here. But I maintain that the statement of the Ambassador in this form is relevant.

Judge Ekwall: The objection will be sustained to the offer.

Mr. Donohue: I note an exception to the court's ruling.

Judge Ekwall: Exception.

Mr. Donohue: And ask that the documents offered, which are here attached to the supplementary brief, be marked collective exhibit next in number for identification.

Judge Ekwall: They will be so marked.

(The documents referred to were marked "Defendant's Collective Exhibit 9" for Identification in Protest No. 57467-K, as of this date.)

Mr. Donohue: I will call Mr. Foster.

Mr. Foster: Your Honor, I am instructed to make a statement by my government that I attend by express permission of the Secretary of the State, out of courtesy to the court.

[fol. 52] John Galway Foster, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

The Clerk: And your address, please?

The Witness: British Embassy, Washington, D. C.

Direct examination.

By Mr. Donohue:

Q. Mr. Foster, what is your present position?

A. I am legal adviser and first secretary to the British Embassy, at Washington.

Q. Do you come here at the request of the Attorney General, and voluntarily?

A. I do.

Q. And with the permission of your own government?

A. Yes; with the express permission of the Secretary of State.

Q. How long have you held your present position?

A. Since the beginning of September 1939.

Q. Are you a member of the bar of Great Britain?

A. I am.

Q. When were you called to the bar?

A. Somewhere between 1927 or '28, I can't remember which.

Q. What experience have you had in practicing your profession and instructing in your profession in Great Britain?

A. Well, I practiced from the time I was admitted in what we call a general common law practice, and I was lecturer at London University and Oxford University. I used to examine for the bar examinations in England, and

also used to lecture to the other bonds of our profession, the solicitors and law society.

Q. In what university did you lecture?

A. Oxford University and London University, but the major part of my work was in practice.

Q. And in your present position are you called upon to advise on legal matters and to interpret laws and statutes?

A. Yes; I am.

Q. To what extent?

A. Well, that constitutes, I suppose, about two-thirds of my work. It differs at different times. I am consulted as the work arises in other departments.

Q. And in your present position have you kept yourself informed on the monetary situation in existence in Great Britain?

A. I have; yes.

Q. Is that part of your official duties?

A. It is, in order to keep myself acquainted, in order to be consulted. It is not my duty to acquaint myself with every statutory rule and regulation. It would be impossible, in fact.

Q. I refer you to Exhibits 1 to 5 in the case at bar, and ask you whether you have heretofore examined copies of those exhibits at my request in Washington, in the office of the general counsel of the Treasury Department?

A. That is so.

[fol. 53] Q. And have you examined them to the point where you are familiar with their contents?

A. Generally familiar; yes.

Q. Since September 3, 1939 have you had occasion to consult with importers and exporters with relation to questions involving importations and exportations of merchandise?

A. Yes; I have.

Q. Now I refer you to general order 291, among the exhibits—which is Exhibit 4 in the case at bar—particularly to that part of Exhibit 4 which sets forth a list of commodities.

A. Yes.

Q. And I ask you concerning that exhibit whether its effect is to restrict the sale for exportation of the articles named there so that they cannot be purchased for exporta-

tion with the use of pounds purchased at the so-called free rate?

Mr. Colburn: That is objected to. I don't believe this witness is competent to answer that question.

Judge Ekwall: Objection overruled.

Mr. Colburn: Exception.

The Witness: Could you put your question again?

Mr. Donohue: Will you read the question?

(The question was read by the reporter.)

Judge Ekwall: Just a minute before he answers. Was it the effect or the purpose?

Judge Keefe: The effect or the purpose, that is the point, Mr. Donohue.

Mr. Donohue: I think I said the effect, your Honor. I am asking him to——

Judge Cline: Just a minute. Read the question.

(The question was again read by the reporter.)

Judge Ekwall: He may answer that question.

A. That is so.

By Mr. Donohue:

Q. Referring to Exhibits 1 to 5, I ask you whether they do actually or in effect create two types or kinds of pounds sterling in the United Kingdom for the period between September 1939 and June 1940?

Mr. Colburn: That is objected to. That is an effort to go behind and challenge the certification of two things by the Federal Reserve Bank, and as such is wholly incompetent, also, the very essence of the case before this court.

Judge Ekwall: Objection to this question will be sustained.

Mr. Donohue: Exception, please.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove by this witness that the effect of the British Orders in Council, designated here in [fol. 54] evidence as Exhibits 1 to 5, inclusive, did not create more than one type or kind of pound sterling in the United Kingdom for the period between September 1939 and June 1940.

Judge Ekwall: If you can ask the correct question, not the effect but the direct question as to whether there was one or more pounds sterling——

Mr. Donohue: That is the next question, your Honor.

By Mr. Donohue:

Q. During the period from September 3, 1939, to the end of June 1940, was there one or more than one type or kind of pound sterling in circulation and in effect in the United Kingdom?

Mr. Colburn: That is objected to as wholly immaterial and incompetent. Again, it is an effort to go behind and question what the Federal Reserve Bank has certified.

Mr. Donohue: May it please the court, it is apparent to me that every question which I will ask from now on which tends to adduce substantive evidence is going to be objected to on the ground that I am seeking to go behind the certification of the Federal Reserve Bank. I think it important that that point be cleared up.

I have stated, and I will restate, that we do not attempt to go behind the certification of the Federal Reserve Bank. We are here to say that that certificate was correct, that the Secretary's action in taking a rate certified was correct; that the action of the Collector in liquidating at the rate certified and published by the Secretary was correct.

We have said that for that reason this matter does not present a justiciable question, and it seems to me that the effect of counsel's objection is to sustain our position in that point.

Nevertheless, counsel for the plaintiff has submitted a case, the effect of which is to claim that the rate used is not the correct rate. Now, that rate was certified, so there is only one other alternative. The plaintiff claims that the other rate should have been used, although the protest doesn't state that specifically.

Now, if the other rate is claimed to be the correct rate, then this court is placing itself in a position where it must consider and determine which of the two rates is correct.

Judge Cline: For this merchandise in this case?

Mr. Donohue: Yes, your Honor; that is with respect to this particular importation.

Now, if that is so, it is part of our case to show that the rate certified here and used in this liquidation is the cor-

rect rate; and we are seeking to remove by factual evidence [fol. 55] one of the contentions which plaintiff is here asserting, to wit, that there were two types or kinds of pounds sterling.

Now, one of the places where pounds sterling circulate is the United Kingdom. Here is an official of the British government, who is an expert on that point, and he can testify to a point which we do not consider in dispute but which seems to be in dispute on the issue that is here presented.

I submit the question goes to the very heart of the case which is framed by plaintiff's pleadings.

Mr. Colburn: And if the court please, counsel repeats he is not attacking the certification by the Federal Reserve Bank, and yet he would seek to adduce through this witness and perhaps others, facts to establish that there is only one kind of a pound. Therefore, when the Federal Reserve Bank said "free" no force or effect can be given to that.

Now, if that isn't attacking directly or indirectly the certification of the Federal Reserve Bank I don't know what an attack means.

It seems to me he is trying to go around through the back door and do what this court and many other courts have said many times can't be done through the front door.

Now I would like to offer a second ground to my objection, and that is that in any event, testimony along this line is wholly immaterial. This court is going to decide this question, I submit, on the basis of an interpretation of our laws and our regulations. The situation in Great Britain is wholly immaterial.

As I pointed out, you might have a Mexican dollar and a yuan dollar that were exchangeable dollar for dollar in China, and yet this court has given effect to certifications of those two different things.

Here, also, I don't care, it is wholly immaterial whether in the United Kingdom something, a pound purchased at the free rate, not the official rate, were exchangeable pound for pound. I don't believe that was so, but if it were so, it is wholly immaterial.

This court is faced with the necessity of construing Section 522 (c) of the Tariff Act of 1930 in the light of the action of the Federal Reserve Bank in certifying two things,

and in the light, further, of how this merchandise at bar was bought and paid for, and that is all it is concerned with; and I submit all the rest of this is wholly incompetent and immaterial.

Judge Ekwall: Will you read the question?

(Read by reporter.)

[fol. 56] Q. "During the period from September 3, 1939 to the end of June 1940, was there one or more than one type or kind of pound sterling in circulation and in effect in the United Kingdom?"

Judge Ekwall: Objection will be overruled. He may answer.

Mr. Colburn: Exception, please.

A. There was one type pound sterling.

By Mr. Donohue:

Q. Are you acquainted, Mr. Foster, with the procedure which was in effect after March 25, 1940, by which there were purchases of pound sterling at the so-called free rate and pound sterling at the so-called official rate?

A. Yes; I am.

Q. Was there any difference in Great Britain in the uses and characteristics of pounds purchased at the official rate and pounds purchased at the free rate?

A. Well, it depends whether physically or legally. The regulation says that a pound purchased at the free rate could not be used legally for purchases of the goods,

Judge Cline: Certain——

The Witness: Yes; that is what this regulation says—payment for the goods is being made in one of the currencies or in pounds purchased at the official rate.

By Mr. Donohue:

Q. Now, Mr. Foster, was the restriction on the purchase of the goods or was the restriction on the exportation?

A. On the exportation, I should say.

Q. In other words——

A. Payment for the exportation. The restriction was on the payment.

Q. Could whiskey be purchased in the United Kingdom with pounds acquired at the free rate?

—. I don't know that.

Q. Is there anything in the regulation 291 which restricts the purchase of whiskey in the United Kingdom?

A. No; no.

Q. Is there any other regulation in effect?

A. Not that I know of. All I know, the regulation says that payment must be made in one of two monies.

Q. Well, is it necessary that payment be made in pounds purchased at the official rate when the transaction is internal?

Mr. Colburn: That is objected to. We are not interested with the internal transactions. We are interested only with exports to the United States, if the court please.

Mr. Donohue: I am trying to establish whether there is one or two currencies in circulation. I submit everything [fol. 57] that tends to show the distinction or the lack of distinction between pounds purchased at the free and pounds purchased at the official rate is relevant to the question. I don't know what other facts can aid this court in its determination.

Judge Ekwall: The objection will be sustained.

Mr. Donohue: Exception, please.

By Mr. Donohue:

Q. Was there any difference between the physical characteristics of pounds purchased at the free and pounds purchased at the official rate?

A. No.

Q. Was there any difference as to their use and circulation in the United Kingdom?

Mr. Colburn: That is the same question over again. Objection.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception. I offer to prove by this witness that there was no distinction between the use of pounds purchased at the free rate and the use of pounds purchased at the official rate in the United Kingdom.

By Mr. Donohue:

Q. Referring to British Order in Council No. 291, in your opinion as a member of the bar of Great Britain does that order operate to create a distinction between the use of

pounds purchased at the free rate and pounds purchased at the official rate in the United Kingdom?

Mr. Colburn: Insofar as the purchase of those goods are concerned?

Mr. Donohue: The question is as I have stated.

Mr. Colburn: I object to it in its present form. If he confines it to the scope of that regulation I won't object, but I do in its present form. To the merchandise that is covered by that regulation I have no objection, but as broad as it is I must object.

Judge Cline: Let's have the question read.

(The question was read by the reporter.)

Judge Cline: Do you limit it to the commodities specified in 291? Will you limit your question?

Mr. Donohue: I think I would have to reframe the question, your Honor. The question is now directed to the use of the pound——

Judge Ekwall: It is a general question.

Mr. Donohue: First, I respectfully submit that the question is proper as presented.

Judge Ekwall: Objection will be sustained.

[fol. 58] Mr. Donohue: Exception, please. I offer to prove that in the opinion of this witness the British Order in Council No. 291 did not create any distinction in the use of pound sterling purchased at the free rate and pound sterling purchased at the official rate in the United Kingdom.

Judge Keefe: I think he has testified to that, Mr. Donohue, outside of the order, in answer to one of your questions. I think that is quite relevant.

Mr. Donohue: Then I will ask the question, your Honor:

By Mr. Donohue:

Q. In your opinion does British Order in Council No. 291, Exhibit 4 in this case, operate to create any distinction between the use of pounds sterling purchased at the free rate and pounds sterling purchased at the official rate in the United Kingdom?

Mr. Colburn: I object to that. It is the same question over again.

Judge Ekwall: Objection will be sustained again.

Mr. Donohue: Exception, please.

By Mr. Donohue:

Q. Were pounds sterling purchased at the free rate and pounds sterling purchased at the official rate the same currency or were they different currencies in Great Britain?

Mr. Colburn: Objected to.
Judge Ekwall: Objection will be overruled.

A. No; the same currency.

Mr. Donohue: That is all, Mr. Foster.
Mr. Colburn: No questions.

(Witness excused.)
Mr. Donohue: Mr. Kennedy!

Sidney J. Kennedy, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

The Clerk: What is your address, please?
The Witness: 29 East 11th Street, New York City.

Direct examination.

By Mr. Donohue:

Q. Mr. Kennedy, what is your present position?
A. My title is Treasury Representative in the United States Customs Service.
Q. Where are you now assigned?
A. I am assigned in charge of the investigative unit of the foreign funds control, 253 Broadway, New York City.
Q. How long have you held that position?
A. I have been there about a year and a half.
[fol. 59] Q. What was your prior assignment in Customs Service?
A. I was Treasury Attaché in London, England.
Q. How long did you hold that position?
A. Four years, over 4 years; from December 1936—not quite 4 years—December 1936 to October 1940.
Q. What were your duties in that position?
A. Principally to make investigations to determine the home market value, export value, or in cases of cost of production of merchandise exported from Great Britain to the United States.

Q. Did your investigation cover all fields of commerce and in all parts of Great Britain?

A. It did; yes.

Q. In the course of your investigations did you have occasion to travel throughout Great Britain?

A. I did, to all parts of Great Britain and Ireland.

Q. How many men were in your office?

A. From 5 to 7 at various times.

Q. Did you have occasion to review the work which they did?

A. Yes; I assigned the work to them and reviewed their reports before they were sent out.

Q. Did you personally make investigations involving the value of merchandise in Great Britain?

A. I did; I made many.

Q. Did you review similar investigations made by your associates in that office?

A. Yes; I reviewed all investigations made by my associates.

Q. And in the course of these investigations was it necessary for you to consider the value of merchandise in English currency and compare it with the value in United States currency or convert to the value in United States currency?

A. Yes, indeed; whenever the sale was made in sterling we verified the payment. Payment, of course, was usually made in dollars, and we had to verify the conversion. Oftentimes we, as a matter of interest to ourselves, compared an export value in dollars with a home market value in sterling, sort of anticipate what the appraiser would do, and often we advised the exporter on what the appraiser was likely to do.

Q. Prior to your assignment in England what was your experience in Customs insofar as it related to the conversion of currency?

A. In all of my experience in Customs, which amounts to some 25 years now, I have been connected with the conversion of currency to some extent or other. I was liquidator for 4 years and liquidators are converting currency daily.

Q. Over what period of time, Mr. Kennedy?

A. I came in the Customs Service in 1920. From 1924 to 1930 I was liquidator.

[fol. 60] Q. What was your next assignment?

A. Next assignment, I was a Customs agent for 2 years. I had little to do with the conversion of currency then.

Then I went to Puerto Rico as Assistant Collector; was Assistant Collector for 2 years and Collector for 2 years, and at that time the Acting Appraiser came under the supervision of the Collector. The liquidators, as you know, came under the supervision of the Collector. Both of them had problems relating to the conversion of currency, which came to my notice sometimes for my advice or approval; sometimes just as a matter of interest, what they were doing.

Q. And during your assignment in Great Britain, and particularly in the period from September 1939 to June 1940, did you ever personally buy currency in Great Britain with United States dollars?

A. Yes; as a matter of necessity. I was paid in dollar checks drawn on the Treasury of the United States, just as are all Government employees, and had to convert those dollars into pounds sterling in order to pay my living expenses in England.

Q. After September 3, 1939, what was the procedure which you followed in purchasing pounds sterling?

Mr. Colburn: That is objected to as wholly immaterial, what he purchased in the United Kingdom. We are concerned with the construction of a statute that deals with purchase in the New York market by cable transfer, not what someone might be doing going around the corner in London, Birmingham, or some place else in England.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception, please.

Judge Ekwall: Exception.

By Mr. Donohue:

Q. During the period from September 3, 1939, to June 1940, did you ever purchase pounds in the New York market at the rate which is designated as free?

Mr. Colburn: Objected to. We are not interested in what he may have done. We are interested only in what the Federal Reserve has certified. I might have gone out and bought them. That doesn't make any difference.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception. I offer to prove that this witness purchased pounds in the New York market between the period of September 3, 1939, and June 1940 and purchased those pounds at the free rate.

[fol. 61] By Mr. Donohue:

Q. What procedure did you follow in purchasing pounds in the New York market at the free rate between September 1939 and June 1940?

Mr. Colburn: Objected to. It just follows up the question to which the court sustained an objection.

Mr. Donohue: That is correct, your Honor.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: I offer to prove by this witness that he purchased pounds in the New York market between the period from September 3, 1939, and June, 1940, and purchased such pounds at the free rate.

Judge Keefe: What is the purpose in the question, Mr. Donohue? Say he did. I haven't any doubt that thousands did. What is your purpose in your question?

Off the record.

(At this point there was discussion which the court ordered off the record.)

By Mr. Donohue:

Q. Could pounds sterling purchased at the official rate be used in England to purchase woolens and all other types of merchandise?

Mr. Colburn: That is objected to. What difference does that make, to prove that the merchandise at bar was purchased with the pound sterling obtained at the free rate? If somebody else could get them on a different basis. I submit it is wholly immaterial, enters the field of speculation.

Mr. Donohue: I don't think I follow counsel in saying that this is connected with the free rate. If there are two pounds sterling, then the conversion here was at the official rate. It is claimed that the conversion should be at the free rate. It is part of our case to establish that the rate of conversion here used, if it affected a currency, affected a currency which could be used for the purchase of this merchandise. It is relevant to the case.

Mr. Colburn: Trying to justify the action of the Secretary in suppressing or attempting to suppress a duly certified rate. It makes no difference.

Mr. Donohue: There we have it. The question is whether or not the action of the Secretary is legal.

Mr. Colburn: No; that isn't the question at all. It is merged and becomes a part of the action of the Collector, as this court has held.

Judge Cline: Read the question.

(The question was read by the reporter.)

[fol. 62] Judge Cline: Isn't that what the stipulation says would be purchased, but only at the official rate in England?

Mr. Donohue: Not woolens, your Honor.

Mr. Colburn: Not woolens, your Honor; certain things that had to be purchased at the official rate.

Judge Cline: Yes.

Mr. Colburn: And that is where it stopped. Everything else was left open.

Judge Cline: Well, that is it.

Judge Ekwall: He is asking whether if they are purchased at the free rate; they certainly would be.

Mr. Colburn: You could go out and cover your house with gold bricks if you wanted to, but why would you pay four naught three when you could pay three four five and did pay three four five.

Mr. Donohue: That is very good testimony, but the witness is on the stand, and I would like to establish that fact from the witness.

Judge Keefe: I think if you will concede, Mr. Donohue, that the court has sufficient intelligence to realize he could buy it with the official four naught five or four naught three —whatever it was—as well as with three or three two two, wouldn't you——

Mr. Donohue: Your Honor, I certainly don't mean to reflect on the intelligence of the court, but after Mr. Colburn and I have confused the case in the manner in which we have——

Judge Keefe: Off the record.

(At this point there was discussion which the court ordered off the record.)

Mr. Donohue: If I may explain the purpose of the question in this way: The official rate is used. It is our purpose to show that the official rate was the only over-all rate, the only rate that could be used for all purposes; that this so-called free rate was a rate that could be used in some respects, but not every respect.

Judge Ekwall: Well, do you contend that it couldn't be used for the purchase of woolen to export from England? That is the question, it seems to me.

Mr. Donohue: Oh, no, your Honor. Let me understand your Honor's question.

Judge Ekwall: I mean, do you contend that the free rate could not be used for the purchase of woolen for export to the United States?

Mr. Donohue: We concede that pounds sterling purchased at the free rate could be used for the purchase of woolens to be exported to the United States on May 3, 1940. We concede that.

[fol. 63] Judge Ekwall: Do you concede that it was done in the purchase of these particular goods?

Mr. Donohue: No, your Honor. We stand by the facts as stated in the stipulation. Those facts are plaintiff's facts, and as stated there, we agree to them.

Judge Ekwall: Well, on this particular question it seems to me perfectly obvious that you could purchase for four dollars and three and a half cents what you could purchase for three dollars twenty-two cents in England. I don't see any particular harm for the question to be answered; but I think there is no use of it, because I think it is perfectly obvious. I think we can take judicial notice of that fact.

We already have in evidence the fact that there were two different rates. That is in the evidence which has been put in by stipulation between the parties, that there were two rates on that day, and of course, you could buy for the higher rate what you could buy for the lower rate.

Mr. Donohue: Well, do I understand that the court will judicially notice that pounds purchased at the official rate could be used in the United Kingdom for all purposes? If that fact is judicially noticeable and is judicially noticed, then I can eliminate some of this testimony.

Judge Ekwall: Pounds purchased at the higher rate in the United Kingdom could be used for purchasing within the United States.

Mr. Donohue: For all purposes, your Honor? This witness can establish that fact. I think it is relevant to the case, and I think the court should have the benefit of his testimony.

Mr. Colburn: Of course, the court has a companion of that. The court would necessarily also judicially recognize

that pounds purchased at the free rate could be used for the payment of everything exported to the United States except the commodities set forth in Exhibit 4, I take it.

Judge Ekwall: Let's hear this question once more.

(Read by reporter.)

"Q. Could pounds sterling purchased at the official rate be used in England to purchase woolens and all other types of merchandise?"

Judge Keefe: The other witness testified that the pound, either official or free, was interchangeable in England and could be used for any purpose.

Mr. Donohue: I don't want to trust my recollection on it, your Honor. I think this witness can testify on that point, and the evidence is relevant to the case.

[fol. 64] Judge Ekwall: The objection will be overruled. He may answer the question.

A. The pounds sterling purchased at the official rate could be used for any purpose in the United Kingdom, for purchase of any material and for any purpose.

By Mr. Donohue:

Q. Could pounds sterling be used for the purchase of any material, whether for domestic consumption or exportation, when those pounds were purchased at the official rate?

A. Yes.

Q. Was there any distinction in the United Kingdom between the use of pounds purchased at the official rate and the use of pounds purchased at the free rate?

A. As to the pound notes themselves, no; once they were in circulation they were indistinguishable one from the other.

Q. What, if any, was the distinction as to the use of pounds purchased at either rate?

A. On and after March 25, 1940, and up to June 10, 1940, certain commodities, 5 in number, could be purchased for exportation to the United States only in United States dollars or in pounds purchased at the official rate; and if the British exporter was selling one of those commodities for exportation he would necessarily require proof in advance they would be paid for in pounds—for instance, at the official rate or in dollars—because he would be

unable to get his export license to ship them until he could prove that.

Q. Did the requirement as to proof that the pounds were purchased at the official rate attach to the passage of title or the permission to export?

Mr. Colburn: Pardon me just a moment. May I ask the question be read?

Judge Keefe: Read the question.

(The question was read by the reporter.)

Mr. Colburn: That is covered by regulation. The evidence is before the court. This witness has shown no competence to interpret the British law. I object.

Judge Ekwall: I think it is objectionable on that ground.

Mr. Donohue: I will qualify the witness further.

By Mr. Donohue:

Q. During your stay in England were you frequently consulted by English firms exporting merchandise to the United States?

A. Yes.

Q. Were you required to advise these exporters on the manner in which the merchandise could be exported to the United States?

A. Yes.

[fol. 65] Q. Did you have occasion to study the manner in which Exhibit 4, regulation 29?, operated in the United Kingdom?

A. Yes.

Q. As a result of your studies on this point, are you able to state whether or not the requirement that pounds sterling be purchased at the official rate for the purchase for export of certain merchandise attached to the right to buy or the right to export? Are you able to say that?

Mr. Colburn: Objected to as wholly immaterial.

Mr. Donohue: It is a qualifying question.

By Mr. Donohue:

Q. Answer "yes" or "no," please.

Judge Ekwall: Objection is overruled as to this.

A. Yes.

By Mr. Donohue:

Q. Will you state whether during the period from March 25th to June 10, 194[illegible] the requirement that pounds sterling be purchased at the official rate for the purchase of certain commodities affected the right to purchase or the right to export those commodities?

A. Affected only the right to export.

Mr. Donohue: That is all, Mr. Kennedy.

Cross-examination.

By Mr. Colburn:

X Q. But 291 says "payment," doesn't it?

A. Yes.

X Q. It does? Your answer was "yes"?

A. I would have to read the order, frankly, to remind myself exactly.

X Q. Well, you testified pretty freely about it on direct examination. You don't recall the order?

A. Well, not word for word.

X Q. You testified that the pound sterling purchased at the official rate could be used in the United Kingdom in payment for all classes of merchandise.

A. Yes.

X Q. That pounds sterling purchased in the New York market at the free rate could not be used in payment for whiskey, tin, rubber, furs, or jute exported to the United States, could they?

A. That would be the effect. My recollection is they would not get an export license unless they could prove——

X Q. That they had paid for it in another kind of payment. Everything else exported to the United States could be paid for with pounds sterling purchased at the free rate, though, couldn't it?

A. Yes.

X Q. Including woolens?

A. Yes.

[fol. 66] X Q. And prior to March 25, 1940, whiskey, furs, tin, rubber, and jute could be, and were, purchased at the free rate, too, weren't they?

A. Yes; that is so.

Mr. Colburn: That is all.

Redirect examination.

By Mr. Donohue:

R. Q. After March 25, 1940, could diamonds purchased with pounds acquired at the free rate be exported to the United States?

A. After June 10, 1940, I know they could not. I am not clear as to the situation with regard to diamonds in particular—it was a strange situation there between March and June 1940. The situation was not a matter of public record. Therefore, I do not know exactly what the situation was.

Mr. Donohue: That is all, Mr. Kennedy.

Mr. Colburn: Well, I have here the diamond order if you want to offer it. Do you wish to offer it—copy of the order with respect to diamonds?

Mr. Donohue: Not at the moment.

Mr. Colburn: No further questions.

(Witness excused.)

Mr. Donohue: I have another witness. Does the court care to——

Judge Cline: Let's recess until 2:30.

(Court recessed until 2:30.)

(Court reconvened at 2:30 p. m.)

Mr. Donohue: Mr. Glasser.

HAROLD GLASSER, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

The Clerk: And your address, please?

The Witness: 622 Bennington Drive, Silver Spring, Maryland.

Direct examination.

By Mr. Donohue:

Q. Mr. Glasser, what is your present position?

A. I am Assistant Director of the Division of Monetary Research, in the Treasury Department.

Q. How long have you been so engaged?

A. 6 years.

Q. What has been your education and experience in the field of monetary research?

A. From the years 1922 to 1935 I studied, did research work in, and taught economics, finance, and monetary problems.

Q. Where did you study and where did you teach?

A. I studied at the University of Chicago and Harvard University. I was research fellow at Brookings Institution. I taught at the University of Akron and the People's Junior College in the City of Chicago.

[fol. 67] Q. What are you duties in your present position?

A. I supervise, engage in the study, the interpretation, and the analysis of economic and monetary problems, particularly those touching upon the international sphere, and prepare recommendations for the Secretary of the Treasury with reference to these problems.

Q. As part of your official duties, did you make any research of the British currency situation?

A. I have continuously studied the British foreign exchange problems from 1936 until 1940, June of 1940, when I left for South America.

Q. And when you were in South America, what were your duties?

A. I was adviser to the Ministry of Finance in the Republic of Ecuador, in which position I advised the Ministry of Finance and the government of Ecuador with respect to problems of their exchange control, the problems of their relationship of their currency with foreign currencies; all monetary problems, tax problems, and economic problems generally.

Q. Specifically, since September 1939, what investigations did you make concerning the sale and use of British pounds purchased at the free and official rates?

A. The sterling dollar rate was, of course, of the greatest interest to the Treasury Department.

Judge Ekwall: I didn't hear that.

The Witness: I say the sterling dollar rate, exchange rate, was, of course, of the greatest interest to the Treasury Department; and in my official capacity I supervised and participated in studies attempting to understand, to interpret, and to analyze the British exchange control system,

its effects upon the United States, its effects upon the various international arrangements with, such as, for instance, the British Trade Agreement and the Tripartite Monetary Court of 1936.

By Mr. Donohue:

Q. What sources of information did you refer to in making such investigation?

A. We used, of course, all sources of information available to the Treasury Department, including diplomatic dispatches, the published literature, and then the results of any special investigations that were made. In this particular case we made a special study in New York, which I supervised, and used various members of my staff studying the methods used to acquire sterling in New York and the purposes for which that sterling was used.

Q. From your investigation, what did you find concerning the manner in which pounds purchased at the official and free rates were sold and used for the period between March and June, 1940?

[fol. 68] Mr. Colburn: That is objected to as wholly immaterial. We have a situation where we have an official certification of what the official and the free pounds were, the rates therefor. Anything this witness may offer that may be interesting would have no possible weight or effect upon this situation before the court. We are faced with the construction of the statute and the facts found by the body that Congress has designated to find what the currency rates are.

Judge Ekwall: Will you read the question?

(The question was read by the reporter.)

Judge Ekwall: Well, what is the object of the question?

Mr. Donohue: The object of the question, your Honor, is in line with the testimony which we have heretofore offered, to show the manner in which pounds purchased at the free and official rates were acquired in the New York market, the manner in which they were used. Only by evidence of that nature can we support the legality and the accuracy of the Collector's action in using the rate of exchange here which he did use.

Now, repeatedly plaintiff's counsel and I have argued on who is challenging, who is accepting the certification of

the Federal Reserve Bank. We, of course, are accepting that. Plaintiff's counsel submits that he, too, is accepting it, but at the same time the protest challenges the legality of the rate used.

Now, if this evidence does nothing else, it tends to show that the rate used was the legal rate. If that isn't squarely supporting the Collector's classification, I don't know what is—not classification; the Collector's use of the conversion rate—then I don't know what is.

Mr. Colburn: The court has the facts before it, consisting of these regulations; it has facts before it establishing that the merchandise at bar was bought and paid for with pounds sterling obtained at the free rate. What light can the testimony of a general character as to the uses or how they were—pounds were—obtained shed on the controversy before the court?

Judge Ekwall: The objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

By Mr. Donohue:

Q. Mr. Glasser, I refer you to Exhibit 4, which is Defence Finance Regulation 291, and particularly to page 2 thereof, wherein, under subparagraph 2, certain classes of merchandise are enumerated. I ask you whether or not you made any investigation to determine whether on and after March 25, 1940, commodities other than those listed in Exhibit 4, on page 2, were purchased by the use of pounds [fol. 69] acquired at the official rate? Did you make any investigation covering that subject?

A. I did.

Q. As a result of your investigation, can you state whether or not commodities other than those listed on page 2 of Exhibit 4 were purchased for export to the United States by pounds acquired at the official rate?

Mr. Colburn: That is objected to as wholly immaterial.

Mr. Donohue: Well, now, your Honor, it is certainly testimony directed to a controverted point. Counsel for plaintiff has presented to this court that the use of free pounds, or that free pounds—pounds purchased at the free rate—could be used for all purposes except the commodities listed in Exhibit 4. That is his contention, as I understand it.

If that evidence is in, it is because it must be relevant to his case.

The question here is directed to test the fact, the ultimate truth of that, whether or not that is true or whether or not there were exceptions to it.

Here is a witness who made investigations, who is ready to state whether or not pounds purchased at the official rate could be used and were used for the purchasing of commodities other than those listed in the exhibit. Now, that is relevant to the case.

Judge Ekwall: What difference would it make if, under the law there, there were just the 5 exceptions?

Mr. Donohue: If there were just the 5 exceptions, then those exceptions are set forth in this order 291, and it could be argued that the Treasury Department had before it that evidence; and while I don't submit that two rates could be used, plaintiff may contend that two rates could be used, and that one rate should be used for this merchandise and one rate for all other merchandise. But if I can show by this witness that not only these commodities but other commodities were purchased with pounds acquired at the official rate, and if I can show by him, and I think I can, that there is no way of knowing from the invoice and entry whether the pounds were purchased at the free or official rate, those facts show that the Customs officials would have no way of establishing a uniformity for the use of a conversion rate. Not only these 5 commodities but other commodities could be purchased with pounds acquired at the official rate, and were purchased with pounds acquired at the official rate.

Mr. Colburn: And what difference would that make, if the merchandise at bar was purchased with pounds obtained at the free rate, so long as there existed a certification of that free rate? I submit it is wholly immaterial.

[fol. 70] Mr. Donohue: It may be that the plaintiff is going to contend that there should be a rate of conversion for each separate importation. I don't know, but certainly I will be able to argue, I believe, in our brief, that such a policy would not be capable of administration.

Now, one thing that we think we can show is that a policy which requires the use of two rates for a single currency is not capable of administration, and the extent to which the currency purchased at these rates could be used is a relevant fact in establishing that.

Mr. Colburn: But my friend's straw is probably trying the solution elsewhere. The court will take judicial notice of the fact that there are more than 4, at least, certifications of currency current in China. I have heard no great wail about the difficulties of administration in applying those various certifications. Certainly it would seem a simple matter for the Collector to determine whether given goods were paid for with free pounds or official pounds. That doesn't seem to me to present any insuperable barrier, if and assuming it was a matter that would enter into consideration by this court.

Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove by this witness that during the period between March 25th and June 1940, articles other than whiskey, rubber, tin, jute, and furs were purchased in the United Kingdom for export to the United States by pounds sterling acquired at the official rate; that these articles included, among other things, woolen goods.

By Mr. Donohue:

Q. Mr. Glasser, did you make any investigation to determine whether or not between the period of March and June 1940 it was required that diamonds when purchased for export to the United States be purchased either in United States dollars or in pounds acquired at the official rate? Did you make any investigation?

A. Yes; I did.

Q. And as a result of your investigation what did you learn?

A. I learned that the purchase of diamonds in England for export required that they be paid for either in dollars or in sterling acquired at the official rate.

Q. Over what period of time was that true?

A. It was in effect some time in February 1940.

Q. Of what year?

A. 1940.

[fol. 71] Q. I show you a copy of Statutory Rules and Orders 1940 No. 689, and I ask you whether or not that refers to diamonds and places them on the list covered by regulation 291, Exhibit 4?

A. This is the Treasury order requiring by law what had been required informally previously.

Q. May I have the exhibit?

A. On this is the 9th of May.

Mr. Colburn: I object to so much of the witness' statement as relates to what had been required informally prior to the order of the British treasury which was shown him. I don't think he has any competence to make such a statement. I ask so much of his answer as relates to that be stricken.

Mr. Donohue: I will consent it be stricken for the moment because it is not responsive to this question.

Judge Ekwall: That portion will be stricken.

Mr. Donohue: I ask that the Statutory Rules and Orders No. 689 be received in evidence.

Mr. Colburn: No objection.

Judge Ekwall: It will be received and marked.

(The document referred to was received in evidence and marked "Defendant's Exhibit 10" in Protest No. 57467-K, as of this date.)

By Mr. Donohue:

Q. Now, Mr. Glasser, you stated that you investigated the purchase of diamonds for export to the United States. What did you do in the course of that investigation?

A. We received diplomatic dispatches, which gave us the basis, gave me the basis for my conclusion that diamonds were sold for export to the United States——

Mr. Colburn: Just a moment. He was asked the question how he went about it. Now we are not interested in the conclusions as a part of this answer, and I am going to object to that conclusion, of course. I ask you to continue your answer, please, to how you got the information.

Judge Ekwall: I think that objection is good.

A. I received the information from a study of the diplomatic dispatches received at the Treasury Department.

By Mr. Donohue:

Q. What is the source of the diplomatic dispatches?

A. These diplomatic dispatches were prepared in the American Embassy in London by persons who were obtain-

ing information at the specific request of the Treasury Department, relating to the study of the methods and administration of the British Exchange Control System.

[fol. 72] Q. Are these the same diplomatic dispatches that you have previously referred to that were used in your other investigation?

A. That is right.

Q. Is the information which they contain accepted by the Treasury Department?

A. It is accepted by the Treasury Department; yes.

Q. Now, as a result of your investigation what did you find concerning the purchase of diamonds for export to the United States as to the currency required to purchase.

Mr. Colburn: For any period of time?

Mr. Donohue: Between February and June of 1940.

Mr. Colburn: That is objected to. I might add to my general ground of objection that the witness' source of information is patently hearsay, second-hand. While the Treasury Department may accept it for its purposes that is a far cry from what may be valid proof in a court of law.

My second objection is that in any event it is wholly immaterial how diamonds may have been some time or other paid for. The merchandise before the court is woolen.

Judge Ekwall: The objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove by this witness that from February to June 1940 diamonds could be purchased for export to the United States only when the currency of purchase was United States dollars or pounds that had been acquired at the official rate.

By Mr. Donohue:

Q. At all times between September 1939 and June 1940 was there one or more than one type or kind of pounds sterling in circulation in the United Kingdom?

Mr. Colburn: That is objected to; witness is wholly incompetent.

Mr. Donohue: The witness has testified that as part of his official duties he studied the monetary situation in great detail.

Now, a person who studies for the purpose of ascertaining facts which cannot be testified to at first hand qualifies as an expert. If this gentleman, with his study, with his background, experience and education, is not an expert in the field of monetary research the Treasury Department is making a mistake, because he is there regarded as such. He has qualified here in the only way that I know how to qualify a monetary expert. That is his field.

Mr. Colburn: He never spent any time in England, but based his whole study upon something somebody else re- [fol. 73] ported; and also, it is another effort to attack indirectly the finding of the Federal Reserve Bank.

Mr Donohue: Well, I hope that I can make one disavowal of any attempt to attack the certification of the Federal Reserve Bank, and ask the court to regard that as standing for all purposes.

Judge Ekwall: Objection will be overruled. He may answer.

Mr. Colburn: Exception.

Judge Ekwall: Exception.

Judge Keefe: Read the question.

(The question was read by the reporter.)

A. There was only one type or kind of pound sterling circulated in the United Kingdom.

Judge Ekwall: Are you referring now to the physical or legal type?

The Witness: Well, I don't know anything about the law, but there was one, only one type or kind of pound sterling that was universally accepted.

Judge Ekwall: Well, I mean physical pound sterling.

The Witness: Well, either physical or bank deposits; of course, the usual form. There was no distinction between one person's bank deposit of sterling or parts of his deposit from other places. They were intermingled continuously and without any tagging.

By Mr. Donohue:

Q. Aside from the fact that there was no physical distinction was there any distinction as to the use of pounds sterling in the United Kingdom?

Mr. Colburn: Objected to again; same ground as heretofore stated. I don't believe this witness is competent to answer that question.

Again, I think it is an indirect attack upon the finding of the Federal Reserve Bank, necessarily, if the court please.

Judge Ekwall: Objection will be sustained to that.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

By Mr. Donohue:

Q. Between March and June 1940 could woolens be purchased in the United Kingdom for expert to the United States with pounds acquired at the official rate?

Mr. Colburn: Objected to. What do we care whether they could or couldn't be? Again, speculation; the same question we had before lunch.

[fol. 74] Judge Ekwall: Objection will be sustained.

Mr. Donohue: Exception.

Judge Ekwall: Exception.

Mr. Donohue: I offer to prove that between March and June of 1940 woolens could be purchased in the United Kingdom for export to the United States with pounds purchased at the official rate.

That is all.

Mr. Colburn: No questions.

(Witness excused.)

Mr. Donohue: We rest.

Mr. Colburn. Submit.

Mr. Donohue: Submit.

Mr. Colburn: I ask 30 days from the transcription of testimony for brief, if the court please.

Mr. Donohue: 30 days thereafter to reply.

Judge Ekwall: Time for briefs requested will be allowed.

IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed September 30, 1942

It is stipulated by and between the Assistant Attorney General for the United States and counsel for the importer in the above-entitled case:

1. That the merchandise covered by the entry the subject of the instant protest consists of woolen fabrics, the product of Scotland, exported from England to the United States on May 3, 1940.

2. That said merchandise was purchased by the plaintiff herein, John Barr, through James Talcott, Inc., New York, New York, from Messrs. Gibson & Lumgair, Ltd. of Selkirk, Scotland, at the invoice prices in pounds sterling, and was appraised under Section 402 of the Tariff Act of 1930 in unit prices in pounds sterling.

3. That on September 3, 1939, the Government of the United Kingdom issued by an Order in Council The Defence (Finance) Regulations Amendment Order, 1939, Statutory Rules and Orders 1939, No. 1067, which was amended and modified by an Order in Council issued on September 21, 1939, entitled The Defence (Finance) (No. 2) Regula- [fol. 75] tions, 1939, Statutory Rules and Orders 1939, No. 1251; that the foregoing Defence (Finance) Regulations, Amendment Order, 1939, and Defence (Finance) (No. 2) Regulations, 1939, were superseded by an Order in Council issued by the Government of the United Kingdom on November 23, 1939, entitled The Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders 1939, No. 1620, sections 2 and 5 (among others) of which were in effect on May 3, 1940; that true and correct copies of the aforementioned Defence (Finance) Regulations Amendment Order, 1939, Defence (Finance) (No. 2) Regulations, 1939, and Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders 1939, Nos. 1067, 1251, and 1620, respectively, are attached hereto and made a part hereof and, subject to the ruling of the Court, may be received in evidence in this case and marked Exhibits 1, 2, and 3 respectively; that United States dollars were on September 4, 1939, and at all times thereafter

to date, designated by the British Treasury in accordance with section 5 (4) of the aforementioned Defence (Finance) Regulations Amendment Order, 1939, and of the aforementioned Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders Nos. 1067 and 1620, respectively; and that the price determined by or on behalf of the British Treasury under section 5 of the last mentioned two Orders for United States dollars and the rate at which "authorized dealers" sold pounds sterling for United States dollars was from September 3, 1939, to September 13, 1939, inclusive, $4.06 per pound sterling, and from September 14, 1939, to January 7, 1940, inclusive, $4.04 per pound sterling, and from January 8, 1940, to the present time, inclusive, has been $4.035 per pound sterling.

4. That effective March 25, 1940, the Government of the United Kingdom issued by an Order in Council (Statutory Rules and Orders 1940, No. 291) certain regulations amendatory of The Defence (Finance) Regulations Amendment (No. 2) Order, 1939, mentioned in the preceding paragraph of this stipulation that the regulations in Statutory Rules and Orders 1940, No. 291, were in effect on May 3, 1940 and that a true and correct copy of Statutory Rules and Orders, 1940, No. 291 is attached hereto and made a part hereof and, subject to the ruling of the Court, may be received in evidence in this case and marked "Exhibit 4."

5. That effective June 10, 1940, by an Order in Council, a further regulation of the Government of the United Kingdom was issued and was implemented by an order of the British Treasury effective the same date, under which regulation and order the restrictions as to payment for the [fol. 76] commodities specified in Exhibit 4 mentioned in paragraph 4 hereof, exported to the United States, with certain exceptions not here relevant, were extended to all goods and merchandise exported to the United States from the United Kingdom; and that said regulation and order are set forth in Statutory Rules and Orders 1940, No. 892, and Statutory Rules and Orders 1940, No. 894, respectively, attached hereto and made a part hereof, and, subject to the ruling of the Court, may be received in evidence herein and together marked "Exhibit 5."

6. That at all times prior to March 25, 1940, the Federal Reserve Bank of New York stating that it was acting under

section 522 (c) of the Tariff Act of 1930 certified daily to the Secretary of the Treasury one buying rate for the pound sterling.

7. That prior to March 25, 1940, there was received by the Secretary of the Treasury a letter from the Federal Reserve Bank of New York, dated March 19, 1940, signed by Vice President L. W. Knoke of that Bank, a true and correct copy of which letter is attached hereto, made a part hereof, and, subject to the ruling of the Court, may be received in evidence and marked "Exhibit 6."

8. That beginning March 25, 1940, and at all times thereafter to the date hereof, the Federal Reserve Bank of New York, stating that it was acting under section 522 (c) of the Tariff Act of 1930, certified daily to the Secretary of the Treasury buying rates in the New York market at noon of foreign currencies in the form and manner of the paper attached hereto and made a part hereof, which, subject to the ruling of the Court, may be received in evidence herein and marked "Exhibit 7"; and that on May 3, 1940, the date of exportation of the involved merchandise to the United States, the buying rates so certified by the Federal Reserve Bank of New York to the Secretary of the Treasury were as set forth in said Exhibit 7.

9. That under the provisions of section 522 (a) of the Tariff Act of 1930, the value estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury as the value of the pound sterling in terms of the money of account of the United States for the quarter begining April 1, 1940, was $8.2397; and that that proclamation of the Secretary of the Treasury is published in T. D. 50125.

10. That the pounds sterling used in the purchase of the merchandise involved in the instant protest were not obtained directly or indirectly from the Bank of England or from an "authorized dealer" as that phrase is defined in section 2 (2) of The Defence (Finance) Regulations Amendment (No. 2) Order, 1939, Statutory Rules and Orders 1939, No. 1620; that said pounds sterling were purchased by the plaintiff herein through The Guaranty [fol. 77] Trust Company of New York in the New York market for cable transfer on May 22, 1940, at $3.21; that on May 22, 1940, the Federal Reserve Bank, stating that it was acting under Section 522 (c), certified to the Secre-

tary of the Treasury the following buying rates: Pound Sterling, $4.035000 "official"; Pound Sterling, $3.227187 "free."

11. That Article 822 (d) of the Customs Regulations of 1937, which was in effect on May 3, 1940, provided:

"(*d*) Rates of exchange for the principal foreign currencies as certified daily by the New York Federal Reserve Bank will be furnished daily by the Customs information exchange to customs officers in the number of copies required, and liquidation will not be made until such Federal reserve bank rates are received. In special cases, or where a rate of currency does not appear on the daily list furnished, the collector will request such rate from the customs information exchange;"

and that the Customs Information Exchange furnished daily to customs officers, customs brokers, and importers concerned a circular setting forth buying rates certified daily by the Federal Reserve Bank of New York which that Bank stated were certified pursuant to section 522 (c), and that a true and correct copy of the circular furnished on May 3, 1940, which is attached hereto and made a part hereof, subject to the ruling of the Court, may be received in evidence and marked "Exhibit 8."

12. That the dutiable value of the involved merchandise was converted by the collector of customs on liquidation for the purpose of assessment and collection of duties from pounds sterling into currency of the United States at the buying rate designated "official" certified by the Federal Reserve Bank of New York for pounds sterling on May 3, 1940, that is, at $4.035 per pound sterling, and that such action by the collector was pursuant to the directors and orders of the Secretary of the Treasury in T. D. 50134 and T. D. 50146.

Dated New York, N. Y., September 30, 1942.

Barnes, Richardson & Colburn, J. Bradley Colburn, Attorneys for the Plaintiff; Paul P. Rao, Assistant Attorney General, Attorney for the Defendant, by Joseph F. Donohue, Special Attorney.

[Filed in Open Court 9/30/42. F. G.]

[fol. 78] EXHIBIT No. 1

Statutory Rules and Orders

1939 No. 1067 Emergency Powers (Defence) Finance

The Defence (Finance) Regulations Amendment Order, 1939

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1939. Price 3*d*. net.

[Statutory Rules and Orders 1939 No. 1067—Emergency Powers (Defence) Finance—The Defence (Finance) Regulations Amendment Order, 1939.—At the Court at Buckingham Palace, the 3rd day of September 1939.]

Present, the King's Most Excellent Majesty in Council

His Majesty, in pursuance of section one of the Emergency Powers (Defence) Act, 1939,[1] and of all other powers enabling him in that behalf, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the Defence (Finance) Regulations, 1939,[2] shall be amended so as to read as follows:—

Acquisition by Treasury of Certain Securities

1. (1) The Treasury may by order direct—

(*a*) That, subject to any exemptions for which provision may be made by the order, no person shall, except with permission granted by or on behalf of the Treasury, sell,

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This Order in effect supersedes the Order in Council (S. R. & O. 1939, No. 950), dated 25th August 1939, containing the Defence (Finance) Regulations, 1939, in their original form.

[1] 2 & 3 Geo. 6. c. 62.

This Order in effect supersedes the Order in Council (S. R. & O. 1939, No. 950), dated 25th August 1939, containing the Defence (Finance) Regulations, 1939, in their original form.

[2] 2 S. R. & O. 1939, No. 950.

transfer, or do anything which involves the creation of a charge on, securities of any such class as may be specified in the order, being a class of securities which, in the opinion of the Treasury, are likely to be marketable outside the United Kingdom, and

(*b*) That the owner of any securities of the said class shall, in such manner and within such period as may be specified in the order, make a return to the Bank of England giving such particulars with respect to those securities as may be so specified.

[fol. 79] For the purposes of this paragraph a person who mortgages or pledges a security shall be deemed thereby to create a charge on the security.

(2) At any time while an order made under the preceding paragraph with respect to securities of any class is in force, the Treasury, if they are of the opinion that it is expedient so to do for the purpose of strengthening the financial position of the United Kingdom, may, by an order made generally with respect to any specified securities of that class, or by directions given with respect to any securities of that class of which any particular person is the owner, transfer to themselves the securities to which the order or directions relates or relate, at a price specified in the order or directions being a price which, in the opinion of the Treasury, is not less than the market value of the securities on the date of the making of the order or the giving of the directions.

(3) Where any order is made, or any directions are given, under the last preceding paragraph with respect to any securities—

(a) Those securities shall forthwith vest in the Treasury free from any mortgage, pledge or charge, and the Treasury may deal with the securities as they think fit.

(*b*) The owner of any of those securities, and any person who is responsible for keeping any register or book in which any of those securities is registered or inscribed or who is otherwise concerned with the registration or inscription of any of those securities, shall do all such things as are necessary or as the Treasury or the Bank of England on their behalf may direct to be done for the purpose of

securing that the security and any document of title relating thereto will be delivered to the Treasury or to such person as the Treasury may direct and, in the case of any registered or inscribed security, that the security will be registered or inscribed in the name of the Treasury or such person as the Treasury may direct.

(4) The duty to deliver any security under the last preceding paragraph shall include a duty to do all such things as are necessary to secure that any dividends or interest on that security becoming payable on or after the date of the making of the order or the giving of the directions will be paid to the Treasury; and where, in the case of any security payable to bearer which is delivered in pursuance of the said paragraph, any coupons representing any such dividends or interest are not delivered with the security, such reduction in the price payable therefor shall be made as the Treasury think fit. *Provided*, That where the price specified in the order or directions in relation to any securities is ex any dividend or ex any interest, this paragraph shall not apply to that dividend or interest or to any coupon representing it.

[fol. 80] (5) A certificate signed by any person authorised in that behalf by the Treasury that any specified securities are securities transferred to the Treasury under this Regulation shall be treated by all persons responsible for keeping any registers or books in which the securities are registered or inscribed, or who are otherwise concerned with the registration or inscription of those securities, as conclusive evidence that the securities have been so transferred.

(6) This Regulation shall not apply to any security if the Treasury are satisfied that at all times since the beginning of the twenty-sixth day of August, nineteen hundred and thirty-nine, all the persons interested in the security, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the said day, but including any persons beneficially interested therein under a trust, were not resident in the United Kingdom.

Restriction on Purchase, Sale, and Loans of Foreign Currency and Gold

(2) In this Regulation the expression "authorised dealer" of the Treasury, no person other than an authorised dealer shall, in the United Kingdom, buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer.

(2) In this Reulation the expression "authorised dealer" means, in relation to any transaction in respect of gold, a person authorised by or on behalf of the Treasury to deal in gold, or, in relation to any transaction in respect of foreign courrency, a person authorised by or on behalf of the Treasury to deal in foreign courrency.

Restriction on Export of Currency, Gold, and Securities, &c.

3. (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury—

(a) Take or send out of the United Kingdom any bank notes, postal orders, gold, securities, or foreign currency, or transfer any securities from the United Kingdom elsewhere, or

(*b*) Draw or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred as consideration—

(i) For receiving a payment, or acquiring property, outside the United Kingdom and the Isle of Man, or

(ii) For a right (whether actual or contingent) to receive a payment, or acquire property, outside the United Kingdom and the Isle of Man,

or make any payment as such consideration.

[fol. 81] (2) The preceding paragraph shall not restrict the doing of anything, within the scope of his authority, by a person authorised by or on behalf of the Treasury to deal in foreign exchange, and shall not restrict the doing

of anything which is certified by or on behalf of the Treasury to be necessary for the purpose—

(*a*) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man, or

(*b*) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(*c*) Of defraying reasonable travelling or other personal expenses.

(3) Any person who on any occasion is about to leave the United Kingdom (which person is hereafter in this paragraph referred to as "the traveller") shall, if requested so to do by the appropriate officer—

(*a*) Declare whether or not he has with him any bank notes, postal orders, gold, securities, or foreign currency;

(*b*) Produce any bank notes, postal orders, gold, securities, or foreign currency which he has with him;

and the appropriate officer and any person acting under his directions may search the traveller and examine or search any article which the traveller has with him, for the purpose of ascertaining whether he has with him any bank notes, postal orders, gold, securities, or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency produced or found upon such examination or search unless either—

(i) The appropriate officer is satisfied that the traveller is, in respect of any bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion, exempt from the restriction imposed by paragraph (1) of this Regulation; or

(ii) The traveller produces to the appropriate officer such a certificate granted by or on behalf of the Treasury as shows that the exportation by the traveller of any bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion does not involve a contravention of that paragraph:

Provided, That no female shall be searched in pursuance of this paragraph except by a female.

(4) Nothing in the preceding provisions of this Regulation shall apply in relation to the taking, sending, or transferring of anything from one part of the United Kingdom to another or from the United Kingdom to the Isle of Man, or in relation to any person traveling between one part of the United Kingdom and another or between the United Kingdom and the Isle of Man.

(5) As respects any goods being goods consigned from the United Kingdom to a destination which is neither in the United Kingdom nor in the Isle of Man, the appropriate officer and any person acting under his directions may examine or search the goods for the purpose of ascertain-
[fol. 82] ing whether there are being sent therewith any bank notes, postal orders, gold, securities, or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency found upon such examination or search unless there appears to the appropriate officer to have been granted by or on behalf of the Treasury a certificate which shows that the sending as aforesaid of the bank notes, postal orders, gold, securities, or foreign currency does not involve a contravention of paragraph (1) of this Regulation.

(6) For the purposes of this Regulation—

(*a*) Any bills of exchange or promissory notes payable otherwise than in sterling shall be deemed to be foreign currency;

(*b*) The expression "transfer" includes transfer by way of loan or security, and a person shall be deemed to transfer securities from the United Kingdom elsewhere if he transfers securities from a register in the United Kingdom to a register outside the United Kingdom; and

(*c*) The expression "the appropriate officer" means any officer of Customs and Excise, any immigration officer, any constable, or any person authorised by a Secretary of State to act under paragraphs (3) and (5) of this Regulation;

and for the purposes of so much of paragraph (1) of this Regulation as restricts the taking or sending of securities out of the United Kingdom, documents of title relating to securities shall be deemed to be securities, and references to securities in paragraphs (3) and (5) of this Regulation

shall be construed as including references to such documents of title as aforesaid.

Acquisition by Treasury of Gold Coin and Bullion

4. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to sell, or to procure the sale of, any gold shall offer that gold, or cause it to be offered, for sale to the Treasury or a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury:

Provided, That the preceding provisions of this paragraph shall not impose upon any person an obligation to offer any gold for sale or to cause any gold to be offered for sale, if—

(*a*) He satisfies the Treasury or a person so designated—

(i) That all the persons intgrested in that gold, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-nine, but including any persons beneficially interested in the gold under a trust, are not resident in the United Kingdom, or

[fol. 83] (ii) That the gold is required for the purpose of performing a contract made before the said day, or

(iii) That the gold is held for the purpose of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man otherwise than by way of dealing in gold, or

(*b*) He is, in respect of that gold, exempted from this Regulation by the Treasury or by a person so designated.

18 & 19 Geo. 5. c. 13

(2) The operation of section eleven of the Currency and Bank Notes Act, 1928, shall be suspended during the continuance in force of this Regulation.

Acquisition by Treasury of Certain Foreign Currency & c.

5. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into opera-

tion is, or after that date becomes, entitled to sell, or to procure the sale of, any foreign currency to which this Regulation applies shall offer it, or cause it to be offered, for sale to the Treasury, or to a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury.

(2) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to assign, or to procure the assignment of, any right to receive outside the United Kingdom and the Isle of Man, in respect of any credit or balance at a bank, payment of any amount in a foreign currency to which this Regulation applies, shall, unless the Treasury or a person designated by the Treasury for the purposes of this Regulation gives him notice to the contrary, do all things necessary for the purpose of assigning that right to the Treasury or to a person so designated.

The sum payable as consideration for any assignment made in accordance with this paragraph shall be such as may be determined by or on behalf of the Treasury.

(3) The preceding provisions of this Regulation shall not impose upon any person an obligation in respect of any currency or right to receive payment of any amount, if—

(*a*) He satisfies the Treasury or a person designated by the Treasury for the purposes of this Regulation that all the persons interested in that currency, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-[fol. 84] nine, but including any persons beneficially interested in the currency under a trust, are not resident in the United Kingdom, or

(*b*) He satisfies the Treasury or a person so designated that the currency or amount, as the case may be, is held or is required for the purpose—

(i) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(ii) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle

of Man otherwise than by way of dealing in foreign exchange, or

(iii) Of defraying reasonable travelling or other personal expenses, or

(*c*) He is, in respect of that currency or right, as the case may be, exempted from this Regulation by the Treasury or by a person so designated.

(4) The foreign currency to which this Regulation applies is such foreign currency as may from time to time be designated by the Treasury for the purposes of this Regulation, by notice published in the London, Edinburgh and Belfast Gazettes.

Control of Capital Issues

6. (1) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful, except with the consent of the Treasury and in accordance with such conditions as the Treasury may impose, to make an issue of capital in the United Kingdom, to make, in the United Kingdom, any public offer of securities for sale, or to renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom.

(2) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful to issue any prospectus or other document offering for subscription, or publicly offering for sale, any securities, which does not include a statement that the consent of the Treasury has been obtained to the issue or offer of the securities.

(3) For the purposes of this Regulation a person shall be deemed to make an issue of capital who—

(*a*) Issues any securities (whether for cash or otherwise), or

(*b*) Receives any money on loan on the terms, or in the expectation, that the loan will or may be repaid wholly or partly by the issue of any securities, or by the transfer of any securities issued after the making of the loan.

(4) In this Regulation, the expression "security" includes a promissory note of a local authority.

[fol. 85] Exemption From Stamp Duty

7. (1) Stamp duty shall not be chargeable on any security by reason only of the assignment, transfer or negotiation thereof to the Treasury, and shall not be chargeable—

(*a*) On any instrument whereby any security is assigned or transferred to the Treasury (whether on sale or otherwise), or

(*b*) On any contract note for, or relating to, any sale of securities to the Treasury.

(2) This Regulation applies only in relation to assignments, transfers, negotiations or sales of securities effected during the continuance in force of this Regulation, whether in compliance with these Regulations or otherwise.

10 Edw. 7 & 1 Geo. 5. c. 8

(3) In this Regulation the expression "contract note" has the meaning assigned to that expression by subsection (3) of section seventy-seven of the Finance (1909-10) Act, 1910.

Power to Obtain Information

8. Without prejudice to any special provision contained in these Regulations, the Treasury may, for the purposes of securing compliance with these Regulations, give to any person directions requiring him, within such time, in such manner and to such persons as may be specified in the directions, to furnish such information as may be so specified and produce for inspection any relevant books, accounts, or other documents.

Application of Certain Provisions of Defence Regulations, 1939

9. The provisions of Part V of the Defence Regulations, 1939, shall apply for the purpose of the enforcement of these Regulations, and otherwise in relation thereto, as if any reference in the said Part V to those Regulations included a reference to these Regulations.

Interpretation

10. In these Regulations, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:

"Bank notes" means bank notes which are legal tender in the United Kingdom or in any part thereof;

"Foreign currency" means any currency other than sterling;

"Gold" means gold coin or gold bullion;

"Immigration officer" means an immigration officer for the purposes of the Aliens Order, 1920;

"Owner," in relation to any security, includes any person who has power to sell or transfer a security, or [fol. 86] who has the custody thereof, or who receives, whether on his own behalf or on behalf of any other person, dividends or interest thereon, or who has any other interest therein;

"Security" includes shares, stock, bonds, notes, debentures, debenture stock, and Treasury bills, but does not include a bill of exchange or, save as otherwise expressly provided, a promissory note; and

"Transfer," in relation to securities, includes the transfer thereof from one register to another.

Short Title

11. These Regulations may be cited as the Defence (Finance) Regulations, 1939.

This Order may be cited as the Defence (Finance) Regulations Amendment Order, 1939.

Any order of the Treasury made under the Defence (Finance) Regulations, 1939, before the coming into force of this Order shall, as respects things done after the coming into force of this Order, have effect as if the said Regulations had at all times contained the definition of the word "transfer" which is included therein by virtue of this Order.

Rupert B. Howorth.

EXHIBIT No. 2

STATUTORY RULES AND ORDERS

1939 No. 1251 Emergency Powers (Defence) Finance

The Defence (Finance) (No. 2) Regulations, 1939

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1939. Price 1*d*. net.

[Statutory Rules and Orders 1939 No. 1251—Emergency Powers (Defence) Finance—The Defence (Finance) (No. 2) Regulations, 1939. At the Court at Buckingham Palace, the 21st day of September 1939.]

Present, the King's Most Excellent Majesty in Council

His Majesty, in pursuance of section one of the Emergency Powers (Defense) Act, 1939,[1] and of all other powers [fol. 87] enabling him in that behalf, is pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the following Regulations shall have effect—

1. (1) The Treasury, by an order, made by them generally with respect to any description of securities, or by a certificate given by them or on their behalf with respect to any particular securities, may exempt the securities to which the order or certificate relates from the provisions of the principal Finance Regulations.[2]

(2) An order or certificate under the preceding paragraph shall be deemed to relate not only to the securities specified in the order or certificate, but also to any securities to which the owner of securities so specified may become or has become entitled as such, either by way of bonus or in consequence of any conversion operation, amalgamation or reconstruction.

2. (1) Nothing in any order under paragraph (1) or paragraph (2), or in paragraph (3), of Regulation 1 of the

[1] 2 & 3 Geo. 6. c. 62.

[2] S. R. & O. 1939 No. 1067.

principal Finance Regulations, and nothing in Regulation 3 of those Regulations, shall apply in relation to any exempted security.

(2) Where, by virtue of subparagraph (*a*) of paragraph (3) of Regulation 1 of the principal Finance Regulations, any security has become vested in the Treasury, then, at any time before the steps required by subparagraph (*b*) of that paragraph to be taken in relation to that security have been taken, the Treasury may, by a declaration made in writing on their behalf, divest themselves of the security; and thereupon the order or directions in consequence of which the security so became vested in the Treasury shall be deemed, for all purposes, not to have been made or given with respect to that security.

(3) Nothing in Regulation 5 of the principal Finance Regulations shall apply in relation to any amount of currency which an owner of an exempted security has become entitled as such to receive.

(4) In this Regulation, the expression "exempted security" means any security to which an order or certificate under Regulation 1 of these Regulations relates.

3. Paragraph (1) of Regulation 3 of the principal Finance Regulations shall have effect as if at the end of that paragraph there were inserted the following words:

"and the Treasury or a person acting on their behalf may impose such restrictions on the making of payments, and the doing of other acts, by bankers in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of subparagraph (*b*) of this paragraph:"

[fol. 88] 4. Paragraph (3) of Regulation 3 of the principal Finance Regulations shall have effect as if for subparagraph (ii) of that paragraph there were substituted the following subparagraph:

"(ii) The traveller produces to the appropriate officer a single certificate granted by or on behalf of the Treasury, showing, with respect to all bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion, that the exportation thereof by him does not involve a contravention of that paragraph."

5. Regulation 5 of the principal Finance Regulations shall have effect as if at the end of that Regulation there were inserted the following paragraph:

"(5) Where any goods are exported from the United Kingdom, the person making entry of the goods shall, if required so to do by or on behalf of the Commissioners of Customs and Excise, deliver to the collector or other proper officer, together with the entry, a declaration in such form, signed by such person, and containing such information relating to the export of the goods and the sum to be received or which is expected to be received in respect of the goods, as the said Commissioners may require with a view to facilitating the enforcement of this Regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which the Regulation applies or not) by reason of the export of goods.

"Without prejudice to any liability to penalties under Part V of the Defence Regulations, 1939,[3] any such declaration shall, for the purposes of section one hundred and sixty-eight of the Customs Consolidation Act, 1876[4] (which imposes penalties on making false declarations), be deemed to be a declaration in a matter relating to the Customs; and if any goods in respect of which a declaration has been required under this paragraph to be delivered are shipped, put off, or water-borne to be shipped, without the declaration having been delivered in accordance with this paragraph, the goods shall be liable to forfeiture under the enactments relating to customs."

6. Regulation 8 of the principal Finance Regulations shall have effect as if in that Regulation there were inserted after the words "the Treasury" the words "any person authorized by or on behalf of the Treasury, or any officer of customs and excise."

7. In these Regulations the expression "the principal Finance Regulations" means the Defence (Finance) Regu-

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[3] S. R. & O. 1939 No. 927.

[4] 39 & 40 Vict. c. 36.

lations, 1939; and these Regulations shall be construed as one with those Regulations.

8. These Regulations may be cited as the Defence (Finance) (No. 2) Regulations, 1939.

Rupert B. Howorth.

[fol. 89] EXHIBIT No. 3

Statutory Rules and Orders

1939 No. 1620—Emergency Powers (Defence) Finance

The Defence (Finance) Regulations Amendment (No. 2) Order, 1939

[Statutory Rules and Orders 1939 No. 1620—Emergency Powers (Defence) Finance—The Defence (Finance) Regulations Amendment (No. 2) Order, 1939—At the Court at Buckingham Palace, the 23rd day of November, 1939.]

Present, the King's Most Excellent Majesty in Council

His Majesty, in pursuance of section one of the Emergency Powers (Defence) Act, 1939,[1] and of all other powers enabling Him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that the Defence (Finance) Regulations, 1939,[2] shall be amended so as to read as follows:

Acquisition by Treasury of Certain Securities

1. (1) The Treasury may by order direct—

(*a*) That, subject to any exemptions for which provision may be made by the order, no person shall, except with per-

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This Order (as well as revoking the Defence (Finance) (No. 2) Regulations 1939 (S. R. & O. 1939 No. 1251)) in effect supersedes the Defence (Finance) Regulations Amendment Order, 1939 (S. R. & O. 1939 No. 1067) which itself superseded the Order in Council (S. R. & O. 1939 No. 950), dated 25th August, 1939, containing the Defence (Finance) Regulations, 1939, in their original form.

[1] 2 & 3 Geo. 6 c. 62.

[2] S. R. & O. 1939 No. 1067.

mission granted by or on behalf of the Treasury, sell, transfer, or do anything which involves the creation of a charge on, securities of any such class as may be specified in the order, being a class of securities which, in the opinion of the Treasury, are likely to be marketable outside the United Kingdom, and

(*b*) That the owner of any securities of the said class shall, in such manner and within such period as may be specified in the order, make a return to the Bank of England giving such particulars with respect to those securities as may be so specified.

For the purposes of this paragraph a person who mortgages or pledges a security shall be deemed thereby to create a charge on the security.

(2) At any time while an order made under the preceding paragraph with respect to securities of any class is in force, [fol. 90] the Treasury, if they are of the opinion that it is expedient so to do for the purpose of strengthening the financial position of the United Kingdom, may, by an order made generally with respect to any specified securities of that class, or by directions given with respect to any securities of that class of which any particular person is the owner, transfer to themselves the securities to which the order or directions relates or relate at a price specified in the order or directions, being a price which, in the opinion of the Treasury, is not less than the market value of the securities on the date of the making of the order or the giving of the directions.

(3) Where any order is made, or any directions are given, under the last preceding paragraph with respect to any securities—

(*a*) Those securities shall forthwith vest in the Treasury free from any mortgage, pledge or charge, and the Treasury may deal with the securities as they think fit;

(*b*) The owner of any of those securities, and any person who is responsible for keeping any register or book in which any of those securities is registered or inscribed or who is otherwise concerned with the registration or inscription of any of those securities, shall do all such things as are necessary or as the Treasury or the Bank of England on their

behalf may direct to be done for the purpose of securing that the security and any document of title relating thereto will be delivered to the Treasury or to such person as the Treasury may direct, and, in the case of any registered or inscribed security, that the security will be registered or inscribed in the name of the Treasury or such person as the Treasury may direct.

(4) The duty to deliver any security under the last preceding paragraph shall include a duty to do all such things as are necessary to secure that any dividends or interest on that security becoming payable on or after the date of the making of the order or the giving of the directions will be paid to the Treasury; and where, in the case of any security payable to bearer which is delivered in pursuance of the said paragraph, any coupons representing any such dividends or interest are not delivered with the security, such reduction in the price payable therefor shall be made as the Treasury think fit:

Provided, That where the price specified in the order or directions in relation to any securities is ex any dividend or ex any interest, this paragraph shall not apply to that dividend or interest or to any coupon representing it.

(5) A certificate signed by any person authorised in that behalf by the Treasury that any specified securities are securities transferred to the Treasury under this Regulation shall be treated by all persons responsible for keeping any registers or books in which the securities are registered or inscribed, or who are otherwise concerned with the regis- [fol. 91] tration or inscription of those securities, as conclusive evidence that the securities have been so transferred.

(6) This Regulation shall not apply to any security if the Treasury are satisfied that at all times since the beginning of the twenty-sixth day of August, nineteen hundred and thirty-nine, all the persons interested in the security, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge or charge created before the said day, but including any persons beneficially interested therein under a trust, were not resident in the United Kingdom.

(7) Where, by virtue of subparagraph (*a*) of paragraph (3) of this Regulation, any security has become vested in

the Treasury, then, at any time before the steps required by subparagraph (*b*) of that paragraph to be taken in relation to that security have been taken, the Treasury may, by a declaration made in writing on their behalf, divest themselves of the security; and thereupon the order or directions in consequence of which the security so became vested in the Treasury shall be deemed, for all purposes, not to have been made or given with respect to that security.

(8) For the purposes of this Regulation, the expression "security" includes a deposit receipt in respect of the deposit of securities.

Restriction on Purchase, Sale, and Loans of Foreign Currency and Gold

2. (1) Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall, in the United Kingdom, buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer.

(2) In this Regulation the expression "authorised dealer" means, in relation to any transaction in respect of gold, a person authorised by or on behalf of the Treasury to deal in gold, or, in relation to any transaction in respect of foreign currency, a person authorised by or on behalf of the Treasury to deal in foreign currency.

Restriction on Export of Currency, Gold, and Securities, &c.

3. (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury—

(*a*) Take or send out of the United Kingdom any bank notes, postal orders, gold, securities, or foreign currency, or

(*aa*) Transfer any security from a register in the United Kingdom to a register outside the United Kingdom, or do any act which is calculated to secure, or forms part of a series of acts which together are calculated to secure, the [fol. 92] substitution, for any security which is either in or registered in the United Kingdom, of a security which is either outside or registered outside the United Kingdom, or

(*b*) Draw, issue, or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred as consideration—

(i) For receiving a payment, or acquiring property, outside the United Kingdom and the Isle of Man, or

(ii) For a right (whether actual or contingent) to receive a payment, or acquire property, outside the United Kingdom and the Isle of Man, or make any payment as such consideration, and the Treasury or a person acting on their behalf may impose such restrictions on the making of payments and the doing of any other acts by bankers in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of subparagraph (*b*) of this paragraph.

(2) The preceding paragraph shall not restrict the doing of anything within the scope of his authority by a person authorised by or on behalf of the Treasury to deal in foreign exchange, and shall not restrict the doing of anything which is certified by or on behalf of the Treasury to be necessary for the purpose—

(*a*) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man, or

(*b*) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(*c*) Of defraying reasonable traveling or other personal expenses.

(3) Any person who on any occasion is about to leave the United Kingdom (which person is hereafter in this paragraph referred to as "the traveller") shall, if requested so to do by the appropriate officer—

(*a*) Declare whether or not he has with him any bank notes, postal orders, gold, securities, or foreign currency;

(*b*) Produce any bank notes, postal orders, gold, securities, or foreign currency which he has with him;

and the appropriate officer and any person acting under his directions may search the traveller and examine or search

any article which the traveller has with him, for the purpose of ascertaining whether he has with him any bank notes, postal orders, gold, securities or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency produced or found upon such examination or search unless either—

(i) The appropriate officer is satisfied that the traveller is, in respect of all bank notes, postal orders, gold, securi- [fol. 93] ties, or foreign currency which he has with him on the said occasion, exempt from the restriction imposed by subparagraph (*a*) of paragraph (1) of this Regulation; or

(ii) The traveller produces to the appropriate officer a single certificate granted by or on behalf of the Treasury, showing, with respect to all bank notes, postal orders, gold, securities, or foreign currency which he has with him on the said occasion, that the taking out by him of the banknotes, postal orders, gold, securities, or foreign currency does not involve a contravention of that subparagraph:

Provided, That no female shall be searched in pursuance of this paragraph except by a female.

(4) Nothing in the preceding provisions of this Regulation shall apply in relation to the taking or sending of anything from one part of the United Kingdom to another or from the United Kingdom to the Isle of Man, or in relation to any person travelling between one part of the United Kingdom and another or between the United Kingdom and the Isle of Man.

(5) As respects any goods consigned from the United Kingdom to a destination which is neither in the United Kingdom nor in the Isle of Man, the appropriate officer and any person acting under his directions may examine or search the goods for the purpose of ascertaining whether there are being sent therewith any bank notes, postal orders, gold, securities, or foreign currency, and may seize any bank notes, postal orders, gold, securities, or foreign currency found upon such examination or search unless there appears to the appropriate officer to have been granted by or on behalf of the Treasury a certificate which shows that the sending as aforesaid of the bank notes, postal orders, gold, securities, or foreign currency does not involve a contravention of paragraph (1) of this Regulation.

(6). For the purposes of this Regulation—

(*a*) Any bills of exchange or promissory notes payable otherwise than in sterling shall be deemed to be foreign currency:

(*b*) The expression "security" includes a deposit receipt in respect of the deposit of securities;

(*c*) The expression "transfer" includes transfer by way of loan or security; and

(*d*) The expression "the appropriate officer" means any officer of Customs and Excise, any immigration officer, any constable or any person authorized by a Secretary of State to act under paragraphs (3) and (5) of this Regulation:

and for the purposes of so much of paragraph (1) of this Regulation as restricts the taking or sending of securities out of the United Kingdom, documents of title relating to [fol. 94] securities shall be deemed to be securities, and references to securities in paragraphs (3) and (5) of this Regulation shall be construed as including references to such documents of title as aforesaid.

Acquisition by Treasury of Gold Coin and Bullion

4. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to sell, or to procure the sale of, any gold shall offer that gold, or cause it be offered, for sale to the Treasury, or to a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury.

Provided, That the preceding provisions of this paragraph shall not impose upon any person an obligation to offer any gold for sale or to cause any gold to be offered for sale, if—

(*a*) He satisfies the Treasury or a person so designated—

(i) That all the persons interested in that gold, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-nine, but including any persons beneficially interested in

the gold under a trust, are not resident in the United Kingdom, or

(ii) That the gold is required for the purpose of performing a contract made before the said day, or

(iii) That the gold is held for the purpose of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle of Man otherwise than by way of dealing in gold, or

(*b*) He is, in respect of that gold, exempted from this Regulation by the Treasury or by a person so designated.

(1A) Where a person has become bound under paragraph (1) of this Regulation to offer, or cause to be offered, any gold for sale, and has not done so, the Treasury may direct that that gold shall vest in the Treasury, and it shall vest in the Treasury accordingly free from any mortgage, pledge, or charge, and the Treasury may deal with it as they think fit, but the Treasury shall pay to the person who would but for the direction be entitled to possession of the gold such price in respect thereof as may be determined by or on behalf of the Treasury.

(2) The operation of section eleven of the Currency and Bank Notes Act, 1828,[3] shall be suspended during the continuance in force of this Regulation.

[fol. 95] Acquisition by Treasury of Certain Foreign Currency, &c.

5. (1) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to sell, or to procure the sale of, any foreign currency to which this Regulation applies shall offer it, or cause it to be offered, for sale to the Treasury, or to a person designated by the Treasury for the purposes of this Regulation, at such price as may be determined by or on behalf of the Treasury.

(1A) Where a person has become bound under paragraph (1) of this Regulation to offer, or cause to be offered, any foreign currency for sale, and has not done so, the Treasury may direct that that currency shall vest in the Treasury and it shall vest in the Treasury accordingly

[3] 18 & 19 Geo. 5. c. 13.

free from any mortgage, pledge or charge, and the Treasury may deal with it as they think fit, but the Treasury shall pay to the person who would but for direction be entitled to possession of the currency such price in respect thereof as may be determined by or on behalf of the Treasury.

(2) Every person resident in the United Kingdom who at the date on which this Regulation comes into operation is, or after that date becomes, entitled to assign, or to procure the assignment of, any right to receive outside the United Kingdom and the Isle of Man, in respect of any credit or balance at a bank, payment of any amount in a foreign currency to which this Regulation applies, shall, unless the Treasury or a person designated by the Treasury for the purposes of this Regulation gives him notice to the contrary, do all things necessary for the purpose of assigning that right to the Treasury or to a person so designated.

The sum payable as consideration for any assignment made in accordance with this paragraph shall be such as may be determined by or on behalf of the Treasury.

(3) The preceding provisions of this Regulation shall not impose upon any person an obligation in respect of any currency or right to receive payment of any amount, if—

(*a*) He satisfies the Treasury or a person designated by the Treasury for the purposes of this Regulation that all the persons interested in that currency or right, other than persons interested therein merely as trustees or merely by virtue of any mortgage, pledge, or charge created before the third day of September, nineteen hundred and thirty-nine, but including any persons beneficially interested in the currency or right under a trust, are not resident in the United Kingdom, or

(*b*) He satisfies the Treasury or a person so designated that the currency or amount, as the case may be, is held or is required for the purpose—

[fol. 96] (i) Of performing a contract made before the third day of September, nineteen hundred and thirty-nine, or

(ii) Of meeting the reasonable requirements of a trade or business carried on in the United Kingdom or the Isle

of Man otherwise than by way of dealing in foreign exchange, or

(iii) Of defraying reasonable travelling or other personal expenses, or

(*c*) He is, in respect of that currency or right, as the case may be, exempted from this Regulation by the Treasury or by a person so designated.

(4) The foreign currency to which this Regulation applies is such foreign currency as may from time to time be designated by the Treasury for the purposes of this Regulation by notice published in the London, Edinburgh, and Belfast Gazettes.

(5) Where any goods are exported from the United Kingdom, the person making entry of the goods shall, if required so to do by or on behalf of the Commissioners of Customs and Excise, deliver to the collector or other proper officer, together with the entry, a declaration in such form, signed by such person, and containing such information relating to the export of the goods and the sum to be received or which is expected to be received in respect of the goods, as the said Commissioners may require with a view of facilitating the enforcement of the Regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which this Regulation applies or not) by reason of the export of goods.

Without prejudice to any liability to penalties under Part V of the Defense Regulations, 1939,[4] any such declaration shall, for the purposes of section one hundred and sixty-eight of the Customs Consolidation Act of 1876[5] (which imposes penalties on making false declarations), be deemed to be a declaration in a matter relating to the Customs; and if any goods in respect of which a declaration has been required under this paragraph to be delivered are shipped, put off, or water-borne to be shipped, without the declaration having been delivered in accordance with this paragraph, the goods shall be liable to forfeiture under the enactments relating to the Customs.

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[4] S. R. & O., 1939, No. 927.

[5] 39 & 40 Vict., c. 36.

General Power to Exempt Securities

5A. (1) Without prejudice to any power conferred on the Treasury by any of the preceding provisions of these Regulations, the Treasury, by an order made by them generally with respect to any description of securities, or by [fol. 97] a certificate given by them or on their behalf with respect to any particular securities, may exempt the securities to which the order or certificate relates from the provisions of Regulations one to five of these Regulations.

(2) An order or certificate under the preceding paragraph shall be deemed to relate not only to the securities specified in the order or certificate, but also to any security to which the owner of securities so specified may become or has become entitled as such, either by way of bonus or in consequence of any conversion operation, amalgamation or reconstruction.

(3) Nothing in any order under paragraph (1) or paragraph (2) or in paragraph (3) of Regulation one of these Regulations, and nothing in Regulation three of these Regulations, shall apply in relation to any security to which an order or certificate under this Regulation relates, and nothing in Regulation five of these Regulations shall apply in relation to any amount of currency which an owner of any such security has become entitled as such to receive.

(4) Any order or certificate made or given by the Treasury under Regulation one of the Defence (Finance) (No. 2) Regulations, 1939, before the twenty-third day of November, nineteen hundred and thirty-nine, shall be deemed for the purposes of these Regulations to be an order or certificate made or given under this Regulation.

(5) For the purposes of this Regulation, the expression "security" includes a deposit receipt in respect of the deposit of securities.

Control of Capital Issues

6. (1) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful except with the consent of the Treasury and in accordance with such conditions as the Treasury may impose, to make an issue

of capital in the United Kingdom, to make, in the United Kingdom, any public offer of securities for sale, or to renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom.

(2) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful to issue any prospectus or other document offering for subscription, or publicly offering for sale, any securities which does not include a statement that the consent of the Treasury has been obtained to the issue or offer of the securities.

(3) For the purposes of this Regulation a person shall be deemed to make an issue of capital who—

(a) Issues any securities (whether for cash or otherwise), or

(*b*) Receives any money on loan on the terms, or in the expectation, that the loan will or may be repaid wholly or partly by the issue of any securities, or by the transfer of any securities issued after the making of the loan.

[fol. 98] (4) A security shall not be invalid by reason that the consent of the Treasury has not been given to the issue thereof, or that any conditions imposed by the Treasury in relation to the issue thereof have not been complied with, but nothing in this paragraph shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent or to comply with such conditions.

(5) In this Regulation, references to securities and to the issue of securities respectively include, as from the twenty-third day of November, nineteen hundred and thirty-nine, references to any mortgage or charge, whether legal or equitable, and to the creation of, or the increasing of the amount secured by, any such mortgage or charge; and the expression "security" includes a promissory note of a local authority and a deposit receipt for money lent issued by a local authority or by any person carrying on any business other than the business of banking.

(6) In the application of this Regulation to Scotland any reference to a mortgage shall include a reference to a heritable security.

Exemption From Stamp Duty

7. (1) Stamp duty shall not be chargeable on any security by reason only of the assignment, transfer or negotiation thereof to the Treasury, and shall not be chargeable—

(*a*) On any instrument whereby any security is assigned or transferred to the Treasury (whether on sale or otherwise), or

(*b*) On any contract note for, or relating to, any sale of securities to the Treasury.

(2) This Regulation applies only in relation to assignments, transfers, negotiations or sales of securities effected during the continuance in force of this Regulation, whether in compliance with these Regulations or otherwise.

(3) In this Regulation the expression "contract note" has the meaning assigned to that expression by subsection (3) of section seventy-seven of the Finance (1909-10) Act, 1910.[a]

Power to Obtain Information

8. Without prejudice to any special provision contained in these Regulations, the Treasury, any person authorised by or on behalf of the Treasury, or any officer of Customs and Excise may, for the purposes of securing compliance with these Regulations, give to any person directions requiring him, within such time, in such manner and to such persons as may be specified in the directions, to furnish [fol. 99] such information as may be so specified and produce for inspection any relevant books, accounts or other documents.

Application of Certain Provisions of Defence Regulations, 1939

9. The provisions of Part V of the Defence Regulations, 1939, shall apply for the purpose of the enforcement of these Regulations, and otherwise in relation thereto, as if any reference in the said Part V to those Regulations included a reference to these Regulations:

Provided, That any thing which is in the possession of an executive authority, as defined by Regulation ninety-four

[a] 10 Edw. 7 & 1 Geo. 5, c. 8.

of the Defence Regulations, 1939, by reason of its having been seized, whether before or after the twenty-third day of November, nineteen hundred and thirty-nine, under Regulation three of these Regulations may, instead of being dealt with under the said Regulation ninety-four, be dealt with in accordance with directions of the Treasury, and where any such thing is so dealt with the Treasury shall, on the application, in the case of a seizure under paragraph (3), of the person from whom the thing was seized, and, in the case of a seizure under paragraph (5), of the person making entry of the goods in question, pay to him such price as appears to the Treasury to have been the market value thereof at the time of the seizure.

Provision as to Payments by Treasury

9A. Nothing in the preceding provisions of these Regulations relating to the payment of any price by the Treasury shall be construed as requiring the Treasury to pay that price otherwise than in sterling or otherwise than in the United Kingdom.

Interpretation

10. In these Regulations, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

"Bank notes" means bank notes which are legal tender in the United Kingdom or in any part thereof;

"Foreign currency" means any currency other than sterling;

"Gold" means gold coin or gold bullion;

"Immigration officer" means an immigration officer for the purposes of the Aliens Order, 1920;[7]

"Owner," in relation an any security, includes any person who has power to sell or transfer the security, or who has the custody thereof, or who receives, whether on his own behalf or on behalf of any other person, dividends or in- [fol. 100] terest thereon, or who has any other interest therein; and

"Security" includes shares, stock, bonds, notes, debentures, debenture stock, and Treasury bills, but does not

[7] S. R. & O. 1920 (No. 448) I, p. 138.

include a bill of exchange or, save as otherwise expressly provided, a promissory note or a deposit receipt.

Short Title

14. These Regulations may be cited as the Defence (Finance) Regulations, 1939.

This Order may be cited as the Defence (Finance) Regulations Amendment (No. 2) Order, 1939.

The Defence (Finance) (No. 2) Regulations, 1939,[8] are hereby revoked.

Rupert B. Howorth.

Exhibit No. 4

Statutory Rules and Orders

1940 No. 291 Emergency Powers (Defence) Finance

Order in Council Adding Regulation 5B to the Defence (Finance) Regulations, 1939

At the Court at Buckingham Palace, the 7th day of March 1940 Present, the King's Most Excellent Majesty in Council 2 & 3 Geo. 6. c. 62.

His Majesty, in pursuance of section one of the Emergency Powers (Defence) Act, 1939, and of all other powers enabling Him in that behalf is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, that after Regulation five A of the Defence (Finance) Regulations, 1939[9], the following Regulation shall be inserted:

Requirement that certain goods exported shall be paid for in Specified Foreign Currency

5B. (1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury, export goods of any class or description specified in paragraph [fol. 107] (2) of this Regulation to a destination in any of

[8] S. R. & O. 1939 No. 1251.
[9] See S. R. & O., 1939, No. 1620.

the territories specified in paragraph (3) of this Regulation, unless it is shown to the satisfaction of the Commissioners of Customs and Excise—

(*a*) That payment for the goods has been made to a person resident in the United Kingdom either in one of the currencies specified in paragraph (4) of this Regulation or with sterling funds purchased, after the third day of September, nineteen hundred and thirty-nine, from a person in the United Kingdom who is an authorized dealer within the meaning of Regulation two of these Regulations, by a payment in one of those currencies; or

(*b*) That payment for the goods is to be so made not later than six months, or such longer period as may be allowed by or on behalf of the Treasury, after the date of export;

and in either case that the amount of the payment for the goods represents the full value of the goods, subject to such deductions, if any, as may be allowed by or on behalf of the Treasury.

(2) The classes and descriptions of goods referred to in paragraph (1) of this Regulation are as follows:

Whisky.

Dressed and undressed fur skins and pieces thereof (including Persian lamb skins and pieces thereof).

The manufactures of fur skins (including Persian lamb skins) known as strips and plates.

Tin ore and concentrates.

Tin in the form of blocks, ingots, bars, and slabs.

Raw rubber (including crepe).

Rubber latex.

Reclaimed rubber.

Raw jute.

Jute yarns.

Jute fabrics of any width, shape, or length (other than carpets, carpeting and floor rugs, floor mats, and matting).

Jute sheets, wrappers, gunnies, sacks, and bags, not in actual use as coverings, receptacles or bindings for other goods.

(3) The territories referred to in the said paragraph (1) are as follows:

(*a*) All territories in or adjacent to the continent of America, with the exception of—

(i) Canada, Newfoundland, and any other part of His Majesty's dominions.

(ii) The Argentine Republic.

(iii) Any dependency of the French Republic.

(*b*) The Philippine Islands and all territories under the sovereignty of the United States of America.

[fol. 102] (*c*) Belgium, the Belgian Congo, and Ruanda-Urundi.

(*d*) The Netherlands and the Netherlands East Indies.

(*e*) Switzerland.

(4) The currencies referred to in the said paragraph (1) are as follows:

Belgas.
Guilders.
Netherlands East Indian guilders.
Swiss francs.
United States dollars.

(5) The Treasury may by order add to or substract from, the classes and descriptions of goods, the territories, and the currencies mentioned in the three last preceding paragraphs and otherwise amend the said paragraphs, and references in paragraph (1) of this Regulation to the classes and descriptions of goods, the territories, and the currencies specified in those paragraphs shall be construed accordingly.

(6) For the purpose of enforcing this Regulation and of satisfying themselves, in the case of any goods, as to the matters specified in paragraph (1) of this Regulation, the Commissioners of Customs and Excise may require the person making entry of the goods to deliver to the collector or other proper officer, together with the entry, such declarations and undertakings signed by such persons as the Commissioners may require, and where any such declaration or undertaking has been so required, the goods shall not be exported until it has been delivered as aforesaid.

(7) Without prejudice to any liability to penalties under Part V of the Defence (General) Regulations, 1939[2]—

(*a*) If any goods are exported in contravention of the provisions of this Regulation or are shipped, put off, or water-borne to be shipped for the purpose of being so exported, the goods shall be liable to forfeiture under the enactments relating to the customs; and

39 & 40 Vict., c. 36

(*b*) Any declaration required to be delivered under paragraph (6) of this Regulation shall, for the purposes of section one hundred and sixty-eight of the Customs Consolidation Act, 1876 (which imposes penalties on making false declarations), be deemed to be a declaration in a matter relating to the customs.

(8) References in this Regulation to the destination of any goods include references to the ultimate destination thereof.

(9) This Regulation shall come into force on the twenty-fifth day of March, nineteen hundred and forty."

Rupert B. Howorth.

[fol. 103] EXHIBIT No. 5

Statutory Rules and Orders

1940 No. 892 Emergency Powers (Defence) Finance

Order in Council Adding Regulation 3C to, and Amending Regulation 5B of, the Defence (Finance) Regulations, 1939

At the Court at Buckingham Palace, the 7th Day of June, 1940

Present, the King's Most Excellent Majesty in Council.

His Majesty, in pursuance of the Emergency Powers (Defence) Acts, 1939 and 1940, and of all other powers enabling Him in that behalf, is pleased, by and with the ad-

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[2] S. R. & O., 1939, No. 927.

vice of His Privy Council, to order, and it is hereby ordered as follows:

1. After Regulation three B of the Defence (Finance) Regulations, 1939, there shall be inserted the following Regulation:

Payments, &c., to Persons Resident in Certain Territories

3C. (1) Save as is provided in this Regulation, no person shall draw, issue, or negotiate any bill of exchange or promissory note or acknowledge any debt so that a right (whether actual or contingent) to receive a payment in the United Kingdom or in the Isle of Man is created or transferred in favour of a person who is resident in any territory specified in an order of the Treasury in that behalf or make any payment to any such person: *Provided*, That this Regulation shall have effect subject to such exemptions, if any, as may be granted by order of the Treasury and shall not prevent the doing of any act for which permission has been granted by or on behalf of the Treasury.

(2) Any person who is desirous of carrying out any such transaction as is mentioned in paragraph (1) of this Regulation may, with permission granted by or on behalf of the Treasury and subject to any conditions which may be imposed by or on behalf of the Treasury, make a payment in sterling to the credit of such a special account as is hereinafter mentioned, that is to say—

(*a*) If the territory specified in the order is declared by the order to be a territory with respect to which an agreement is in force for the regulation of payments between the United Kingdom and that territory, a special account recognised for the purposes of this Regulation by the Bank of England as an account established under the agreement.

(b) If the territory specified in the order is not declared by the order to be such a territory as aforesaid, the Treasury special account, that is to say, such account, being an [foreign] account in the name of the Treasury, as may be designated by or under the order as the Treasury special account for that territory.

(3) Where a payment is made to the credit of a Treasury special account under this Regulation, the receipt of the Treasury or a person authorized by the Treasury for the

sum paid shall, to the extent of the sum paid, be a good discharge to the person from whom the debt was due: *Provided*, That where the debt is not in sterling the extent of the discharge shall be ascertained by converting the amount paid into the currency in which the debt was payable at such rate of exchange as the Treasury may determine.

(4) The amount standing to the credit of any Treasury special account shall from time to time as the Treasury may direct be applied in accordance with any agreement made for the regulation of payments between the United Kingdom and the territory in question or, if no such agreement is made, for the purpose of paying, in whole or in part and in such order and at such times as the Treasury thinks fit, debts due from persons resident in the territory in question to persons resident in the United Kingdom or in such other territories as may be specified in an order of the Treasury in that behalf.

(5) The power conferred by paragraph (1) of Regulation three of these Regulations on the Treasury or a person acting on their behalf to impose such restrictions on the making of payments and the doing of any other acts by bankers in the course of their business as appear to the Treasury to be necessary or expedient for the purpose of securing the due enforcement of subparagraphs (*a*) and (*c*) of that paragraph shall apply in relation to the due enforcement of this Regulation as it applies in relation to the due enforcement of those subparagraphs.

2. Regulation five B of the Defence (Finance) Regulations, 1939, shall be amended as follows:

(*a*) For paragraph (1) there shall be substituted the following paragraph:

"(1) Subject to any exemptions which may be granted by order of the Treasury, no person shall, except with permission granted by or on behalf of the Treasury, export goods of any class or description to a destination in any territory to which this Regulation is applied by order of the Treasury, unless it is shown to the satisfaction of the Commissioner of Customs and Excise—

(*a*) That payment for the goods has been made to a person resident in the United Kingdom in such manner as may be prescribed in relation to the territory in question;

(*b*) That payment for the goods is to be so made not later than six months, or such longer period as may be allowed by or on behalf of the Treasury, after the date of export;

[fol. 105] and in either case that the amount of the payment of the goods represents the full value of the goods, subject to such deductions, if any, as may be allowed by or on behalf of the Treasury."

(*b*) Paragraphs (2) to (5) and paragraph (9) shall be revoked;

(*c*) Paragraphs (6), (7), and (8) shall be renumbered as paragraphs (2), (3), and (4), and in subparagraph (*b*) of the said paragraph (7), for the words "paragraph (6) of this Regulation," there shall be substituted the words "paragraph (2) of this Regulation;" and

(*d*) For the marginal note there shall be substituted the following marginal note:

"Requirements as to payment for goods exported to certain territories."

3. (1) This Order shall come into force on the 10th day of June 1940.

(2) Proceedings in respect of a contravention, before the tenth day of June, nineteen hundred and forty, of Regulation five B of the Defence (Finance) Regulations, 1939, may be instituted, and any punishment imposed in any such proceedings may be enforced, as if this Order had not been made.

Rupert B. Howorth.

Statutory Rules and Orders

1940 No. 892 Emergency Powers (Defence) Finance

Order in Council Adding Regulation 3C to, and Amending Regulation 5B of, the Defence (Finance) Regulations, 1939

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1940. Price 1d. net.

Statutory Rules and Orders

1940 No. 894 Emergency Powers (Defence) Finance—Export of Goods

The Defence (Finance) (Export of Goods) (No. 1) Order, 1940. Dated June 7, 1940

The Treasury, in pursuance of their powers under paragraph (1) of Regulation 5B of the Defence (Finance) Regu- [Vol. 106] lations, 1939,[3] and of all other powers enabling them in that behalf, hereby make the following Order:

1. The said Regulation 5B shall apply to the territories specified in the first column of the Schedule to this Order, and for the purposes of subparagraphs (*a*) and (*b*) of paragraph (1) of that Regulation, the prescribed manner of payment for goods exported to a destination in any of the said territories shall be the manner specified in relation to that territory in the second column of the said Schedule.

2. This Order may be cited as the Defence (Finance) (Export of Goods) (No. 1) Order, 1940.

3. This Order shall come into operation on the tenth day of June, 1940.

Dated this seventh day of June 1940.

James Stuart, Patrick Buchan-Hepburn, Two of the Lords Commissioners of His Majesty's Treasury.

[3] *See* S. R. & O., 1940, Nos. 291 and 892.

Schedule

Territories to which Regulation 5B applies	Prescribed manner of payment for goods
The United States of America, the Philippine Islands, and all territories under the sovereignty of the United States of America.	United States dollars, or sterling funds purchased, after the third day of September, nineteen hundred and thirty-nine, from a person in the United Kingdom who is an authorised dealer within the meaning of Regulation 2 of the Defence (Finance) Regulations, 1939, by a payment in United States dollars.
Switzerland	Swiss francs, or sterling funds purchased, after the third day of September, nineteen hundred and thirty-nine, from a person in the United Kingdom who is an authorised dealer within the meaning of Regulation 2 of the Defence (Finance) Regulations, 1939, by a payment in Swiss francs.
Sweden	Swedish kronor, or sterling funds obtained from a Swedish special account for the purposes of Regulation 3C of the Defence (Finance) Regulations, 1939.

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Stationery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1940. Price 1d. net.

[fol. 107]

EXHIBIT No. 6

Federal Reserve Bank of New York

March 19, 1940.

DEAR MR. SECRETARY:

From advices which we have received from London, we understand that under the Defence (Finance) Regulation Amendment Order, 1939, of the Government of the United Kingdom, from and after March 25, 1940, exchange proceeds in designated currencies, including United States dollars, derived from specified exports from the United Kingdom to certain countries including the United States, the Philippine Islands and all territories under the sovereignty of the United States, must, in effect, be sold to authorized banks for surrender to the Bank of England at such rate of exchange as may be fixed from time to time by or on behalf of the British Treasury, or such exports must be paid for in pounds sterling purchased at such fixed rate of exchange with one of such designated currencies.

In view of the foregoing, we shall, commencing Monday, March 25, 1940, certify to the Secretary of the Treasury pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the pound sterling, one of which will be designated "free," being the rate we are now certifying, and the other of which will be designated "official," being the rate fixed by or on behalf of the British Treasury, at present $4.03½ United States currency per pound sterling.

We understand that under the foreign exchange control orders of the Canadian Government currently in effect, proceeds of United States dollar exchange derived from exports from Canada must be sold to an authorized dealer at rates fixed from time to time by the Canadian Foreign Exchange Control Board; or, if such exports are paid for in Canadian dollars, such Canadian dollars must be purchased from authorized dealers at such rates with United States dollars, provided, however, that in instances where specific permission is granted by the Exchange Control Board, the Canadian exporter may accept, in payment of the purchase price of the exports, Canadian dollars purchased at the free rate.

In view of the foregoing, we shall, commencing Friday, March 22, 1940, certify to the Secretary of the Treasury pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the Canadian dollar, one of which will be designated "free," being the rate we are now certifying, and the other of which will be designated "official," being the rate fixed by the Canadian Foreign Exchange Control Board, at present $0.9090+ United States currency per Canadian dollar.

[fol. 108] We understand that the situation respecting foreign exchange controls existing in Newfoundland in respect of the Newfoundland dollar is comparable to the situation existing in Canada with respect to the Canadian dollar. In the circumstances, we shall, commencing Friday, March 22, 1940, certify to the Secretary of the Treasury pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the Newfoundland dollar, one of which will be designated "free," being the rate we are now certifying, and the other of which will be designated "official," being the rate fixed by the Newfoundland Foreign Exchange Control Board, at present $0.9090+ United States currency per Newfoundland dollar.

As you know, it has been our practice, since 1922, to make available, with the consent of the Treasury Department, to the press and public the foreign exchange rates which this bank has certified daily to the Secretary of the Treasury. In the absence of instructions from the Treasury Department to the contrary, we will assume that the Treasury Department wishes us to continue this practice on and after March 22, 1940, in the case of the Canadian and Newfoundland dollar, and on and after March 25, 1940, in the case of the pound sterling.

Faithfully yours, L. W. Knoke, Vice President.

Honorable Henry Morgenthau, Jr., Secretary of the Treasury, Washington, D. C.

EXHIBIT No. 7

Federal Reserve Bank of New York

Date, May 3, 1940.

The Honorable the Secretary of the Treasury.

SIR:

In pursuance of the provisions of Section 522 of the Tariff Act of 1930, dealing with the conversion of foreign currency for the purpose of the assessment and collection of duties upon merchandise imported into the United States, we have ascertained and hereby certify to you that the buying rates in the New York Market at noon today for cable transfers payable in the foreign currencies are as shown on the reverse side.

Respectfully, Per pro D. J. Liddy, Foreign Department.

[fol. 109]

Values of foreign currencies

[Value in U. S. dollars]

Country	Monetary unit	Noon buying rate for cable transfers in New York
Europe:		
Belgium	Belga	.168012.
Bulgaria	Lev	(1).
Czecho-Slovakia	Koruna	(1).
Denmark	Krone	(1).
England	Pound Sterling	4.035000 Official.
England	Pound Sterling	3.475138 Free.
Finland	Markka	.017666.
France	Franc	.019689.
Germany	Reichsmark	[2] .401133.
Greece	Drachma	[2] .006607.
Hungary	Pengo	[2] .175830.
Italy	Lira	.050457.
Netherlands	Guilder	.530781.
Norway	Krone	(1).
Poland	Zloty	(1).
Portugal	Escudo	.033675.
Roumania	Leu	(3).
Spain	Peseta	[2] .091304.
Sweden	Krona	.238125.
Switzerland	Franc	.224138.
Yugoslavia	Dinar	[2] .022440.
Asia:		
China	Chefoo Dollar (Yuan)	(1).
China	Hankow Dollar (Yuan)	(1).
China	Shanghai Dollar (Yuan)	[2] .043787.
China	Tientsin Dollar (Yuan)	(1).
Hong Kong	Dollar	.215000.
India (British)	Rupee	.301721.
Japan	Yen	.234383.
Straits Settlements	Dollar	.471356.
Australasia:		
Australia	Pound	3.228000 Official.
Australia	Pound	2.768125 Free.
New Zealand	Pound	2.779166.
Africa:		
Union of South Africa	Pound	3.980000.
North America:		
Canada	Dollar	.909090 Official.
Canada	Dollar	.844464 Free.
Mexico	Peso	[2] .166575.
Newfoundland	Dollar	.909090 Official.
Newfoundland	Dollar	.842291 Free.
South America:		
Argentina	Peso	[2] .297733.
Brazil	Milreis	[2] .060575 Official.
Brazil	Milreis	[2] .050333 Free.
Chile	Peso	[2] .051650 Official.
Chile	Peso	[2] .040000 Export.
Colombia	Peso	[2] .569850.
Uruguay	Peso	[2] .658300 Controlled.
Uruguay	Peso	[2] .389500 Noncontrolled.

[1] No rates available.
[2] Nominal rate.
[3] Temporarily omitted.

[fol. 110]

C. I. E. 411/40.
May 3, 1940.

EXHIBIT No. 8

Re Section 522 (c) of the Tariff Act of 1930

[Value in U. S. dollars]

Country	Monetary unit	Noon buying rate for cable transfers in New York
Europe:		
Belgium	Belga	.168012.
Bulgaria	Lev	No rates available.
Czecho-Slovakia	Koruna	No rates available.
Denmark	Krone	No rates available.
England	£ Sterling	4. 035000 Official.
	£ Sterling	3. 475138 Free.
Finland	Markka	.017666.
France	Franc	.019689.
Germany	Reichsmark	.401133.[1]
Greece	Drachma	.006607.[1]
Hungary	Pengo	.175830.[1]
Italy	Lira	.050457.
Netherlands	Guilder	.530781.
Norway	Krone	No rates available.
Poland	Zloty	No rates available.
Portugal	Escudo	.033675.
Roumania	Leu	Temporarily omitted.
Spain	Peseta	.091304.[1]
Sweden	Krona	.238125.
Switzerland	Franc	.224138.
Yugoslavia	Dinar	.022440.[1]
Asia:		
China	Chefoo Yuan $	No rates available.
China	Hankow Yuan $	No rates available.
China	Shanghai Yuan $	.043787.[1]
China	Tientsin Yuan $	No rates available.
Hong Kong	Dollar	.215000.
India (British)	Rupee	.301721.
Japan	Yen	.234383.
Straits Settlements	Dollar	.471356.
Australasia:		
Australia	Pound	3. 228000 Official.
Australia	Pound	.768125 Free.
New Zealand	Pound	2. 779166.
Africa: Union of So. Africa	Pound	3. 980000.
N. America:		
Canada	Dollar	.909090 Official.
Canada	Dollar	.844464 Free.
Mexico	Peso	.166575.[1]
Newfoundland	Dollar	.909090 Official.
Newfoundland	Dollar	.842291 Free.
S. America:		
Argentina	Peso	.297733.[1]
Brazil	Milreis	.066575 Official.
Brazil	Milreis	.050333 Free.[1]
Chile	Peso	.051650 Official.[1]
Chile	Peso	.040000 Export.[1]
Colombia	Peso	.569850.[1]
Uruguay	Peso	.658300 Controlled.[1]
Uruguay	Peso	.389500 Noncontrolled.[1]

[1] Nominal rate.

Circulated by the Customs Information Exchange, New York, N. Y.
HA: edw
5/4/40.
May 3, 1940.

[fol. 111] EXHIBIT No. 10

Statutory Rules and Orders

1940 No. 689 Emergency Powers (Defence) Finance

The Payment for Exports (Control) (No. 1) Order, 1940, dated May 9, 1940, made by the Treasury under Regulation 5B of the Defence (Finance) Regulations, 1939.

The Treasury, in pursuance of their power under paragraph (5) of Regulation 5B of the Defense (Finance) Regulations, 1939[1] (which requires that certain goods exported shall be paid for in certain foreign currencies mentioned in the said Regulation) and of all other powers enabling them in that behalf, hereby make the following Order:

1. There shall be added to the classes and descriptions of goods mentioned in paragraph (2) of the said Regulation 5B the goods specified in the Schedule to this Order.

2. In accordance with the foregoing article the said paragraph (2) shall be amended by inserting after the word "whisky" the words contained in the Schedule to this Order.

3. This Order may be cited as the Payment for Exports (Control) (No. 1) Order, 1940, and shall come into force on the 20th May, 1940.

Dated this ninth day of May 1940.

W. W. Boulton, Patrick Buchan-Hepburn, Two of the Lords Commissioners of His Majesty's Treasury.

Schedule

Diamonds rough and diamonds advanced in condition from their rough state by any process, but not including dies (whether mounted or not) of diamond, tools and tool parts of which the cutting edge is tipped with diamond, or diamonds mounted or set in jewellery of precious metal.

London—Printed and published by His Majesty's Stationery Office. To be purchased directly from H. M. Sta-

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[1] *See* S. R. & O. 1940, No. 291.

tionery Office at the following addresses: York House, Kingsway, London, W. C. 2; 120 George Street, Edinburgh 2; 26 York Street, Manchester 1; 1 St. Andrew's Crescent, Cardiff; 80 Chichester Street, Belfast; or through any bookseller. 1940. Price 1*d.* net.

[fol. 112] IN UNITED STATES CUSTOMS COURT

(C. D. 801)

JOHN BARR

v.

UNITED STATES

Protest 57467—K1584 against the decision of the collector of customs at the port of New York

DECISION—July 30, 1943

EKWALL, Judge: The question involved in this case is the proper rate at which the currency of the invoice of certain imported goods should be converted into United States dollars under the provisions of section 522 (c) of the Tariff Act of 1930. The merchandise consists of wool cloth manufactured in Scotland and exported to this country on May 3, 1940, under an invoice made out in pound sterling. For the purpose of assessment of the ad valorem duty upon this wool cloth it was necessary for the collector of customs at the port of entry to convert the pounds sterling to United States currency.

On the date of exportation the Federal Reserve bank, acting under authority of section 522 (c) of said Tariff Act of 1930, determined and certified to the Secretary of the Treasury two buying rates for pounds sterling, viz, an "official" rate of $4.035 and a "free" rate of $3.475138. The collector of customs, acting under instructions of the Secretary of the Treasury (T. D. 50134), used the "official" or "controlled" rate and it is the contention of the plaintiff herein that he should have adopted the "free" rate noted above. In this connection it may be noted here that the term "official" applies to the rate fixed by the British

Government and does not signify official action of the Government of the United States.

Section 522, *supra*, provides as follows:

Sec. 522. Conversion of Currency.

(a) Value of Foreign Coin Proclaimed by Secretary of Treasury.—Section 25 of the Act of August 27, 1894, entitled "An Act of reduce taxation, to provide revenue for the Government, and for other purposes," as amended, is reenacted without change as follows.

"Sec. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quaterly on the 1st day of January, April, July, and October in each year."

(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after [fol. 113] the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public

at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

The facts have been submitted upon a stipulation accompanied by certain documentary exhibits. The Government produced three witnesses. The relevant stipulated facts may be summarized as follows. Under the Defence (Finance) Regulations, 1939, beginning September 3, 1939, there were adopted by the United Kingdom certain regulations affecting the internal control of currency. The first of these required that all persons resident in the United Kingdom who at the time the regulation went into effect possessed or thereafter acquired any foreign currency, should offer it or cause it to be offered for sale to the Treasury at a price (rate of exchange) determined by the Treasury. By amendment to the last-named provision, under date of September 21, 1939, it was provided as follows:

Where any goods are exported from the United Kingdom, the person making entry of the goods shall, if required so to do by or on behalf of the Commissioners of Customs and Excise, deliver to the collector or other proper officer, together with the entry, a declaration in such form, signed by such person, and containing such information relating to the export of the goods and the sum to be received or which is expected to be received in respect of the goods, as the said Commissioners may require with a view to facilitating the enforcement of this Regulation and the obtaining of information as to the amounts obtainable in foreign currency (whether a foreign currency to which this Regulation applies or not) by reason of the export of goods.

* * * * * * * * *

It was further provided that exchanges of certain foreign currency (including United States dollars) and pounds sterling in the United Kingdom should be made only through the Bank of England or an "authorized dealer." Statutory Rules and Orders 1939 No. 1251, Emergency Powers (Defence) Finance. (Exhibit 2.)

[fol. 114] On November 23, 1939, there was promulgated an order directing that

Except with permission granted by or on behalf of the Treasury, no person other than an authorized dealer shall, in the United Kingdom, buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer. [Statutory Rules and Orders 1939 No. 1620 Emergency Powers (Defence) Finance. Exhibit 3.]

This currency control on the part of Great Britain was effective only within the United Kingdom and not until March 25, 1940 did the British Government by specific regulation extend its currency control to this country. Under the Order in Council of March 7, 1940, effective on March 25 [Statutory Rules and Orders 1940 No. 291 Emergency Powers (Defence) Finance. Exhibit 4], payment for certain enumerated exports to the United States was required to be made in either United States dollars or pounds sterling purchased in the United Kingdom from the Bank of England or an agent of such bank at the fixed British "official" rate of exchange. However, this order did not apply to woolen goods of the character of those here involved.

At all times prior to March 25, 1940, the Federal Reserve bank of New York certified daily to the Secretary of the Treasury one buying rate for the pound sterling. Beginning on that date the Federal Reserve bank began to certify under section 522 (c), *supra*, two rates of exchange, one of which was designated "free," and the other "official," the latter being the rate fixed by or on behalf of the British Treasury. As above stated, the rates determined by the Federal Reserve bank and certified to the Secretary of the Treasury for May 3, 1940, the date of exportation in this case, were an "official" rate of $4.035 and a "free" rate of $3.475138. The Secretary instructed collectors to use the "official" rate and published that rate only.

It is contended on the part of the plaintiff herein that under section 522 (c), *supra*, determination of buying rates by the Federal Reserve bank is final and conclusive and the Secretary of the Treasury has no discretionary power to vary, set aside, or nullify such determination. The Government contends that the said section contemplates the determination, certification, publication, and use of only

one buying rate for each single currency; therefore, it alleges, the determination and certification of two rates for May 3, 1940, was improper and the Secretary of the Treasury should either (1) have rejected both rates or (2) have determined which certified rate was proper.

A reading of the statute involved bears out the plaintiff's argument. It states in plain unambiguous language that the buying rate "shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury." It further provides that the Secre- [fol. 115] tary of the Treasury "shall make it public at such times and to such extent as he deems necessary." Nothing in the language quoted can by any stretch of the imagination be interpreted as conferring power upon the Secretary to accept or reject any rate, or to make any determination as to whether the rate is or is not proper. The only authority given the Secretary is to make such determination public and in this he is given discretion as to the time and extent of the publication. On the question of the use of the singular noun as denoting that only one buying rate is contemplated and that the certification of two rates was improper, it is a well-known rule in construction of statutes that when it is necessary to give effect to the legislative intent, words importing the singular only will be applied to the plural of person and things. (*See* 36 Cyc. 1123, 1.)

It is the duty of the court in interpreting the law to endeavor insofar as possible to carry out the will and intent of the lawmakers. In so doing we must endeavor to arrive at the object to be attained. The purpose of laws imposing ad valorem duties on imported merchandise has always been to take as the basis upon which duties are to be computed the true value of the goods in the country which produced them or in which they were obtained, such value to be ascertained by the actual purchase price or by the market value as a basis. To this end the various revenue laws have from time to time introduced new provisions in order that collectors may fix the foreign value correctly and in order that duties shall be uniform. The regulation by statute of the value of foreign currencies is designed to accomplish that purpose. Where the value of merchandise is expressed on the invoice in depreciated currency the various statutes have provided a method of determining whether the assumed value of the foreign currency remains unchanged and whether the actual value

corresponds with the nominal value, in order to carry out the intention of Congress by keeping the fluctuations of nominal values to the standard of specie values.

In very early times the value of foreign coins was fixed by statute and was based upon their pure metal value as expressed in money of account of the United States. By the act of March 3, 1873, all prior acts were repealed and a general law was substituted whereby it was provided that the value of foreign coins should be that of the pure metal, declared annually by the Director of the Mint, and proclaimed by the Secretary of the Treasury. By the act of August 27, 1894, Congress for the first time took cognizance of an alternative basis for the conversion of foreign currencies, and in the proviso to section 25 of that act the Secretary of the Treasury was permitted to order the reliquidation of an entry at a value different from that of the pure metal value of the foreign coin "whenever satis- [fol. 116] factory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred." Thus for the first time the Secretary of the Treasury was empowered to determine the exchange rate and his determination thereunder was held to be conclusive. *United States* v. *Whitridge*, 197 U. S. 135, 49 L. ed. 696.

In the Emergency Tariff Act of 1921 (section 403), the method of determining foreign exchange values was revised and in place of the discretionary power theretofore granted to the Secretary of the Treasury the determination of the values of foreign currencies was placed in the Federal Reserve Bank of New York. The Court of Customs Appeals (now the Court of Customs and Patent Appeals) in the case of *Fry & Friedsam* v. *United States*, 12 Ct. Cust. Appls. 486, T. D. 40694, had occasion to discuss this revision and the reasons therefor. We quote from their decision as follows:

It will be observed that section 403 of the emergency tariff act of May 27, 1921, purports to be, and is, a complete revision of said section 25; that said section 25 is repeated without material change until that portion of said section is reached in and by which a method is provided for as-

certaining foreign exchange values. That portion of said section is omitted from section 403 of the act of May 27, 1921, and is therefore repealed. In lieu of the method provided by said section 25, a new method of ascertainment of the value of foreign currency is provided, namely, a determination by the Federal Reserve Bank of New York, which shall be certified daily to the Secretary of the Treasury, and which said valuation as to any importation shall be effective at noon on the day of exportation.

It is evident this change in our method of fixing foreign currency values was brought about by the violent fluctuations in the values of foreign currency during the period immediately following the World War, and which existed at the time of the enactment of said emergency tariff act of 1921. By said section 25, cumbersome and slowly moving machinery was provided by which, on special occasions, and upon the production of "satisfactory evidence," the Secretary of the Treasury might ascertain and fix a different exchange value from that proclaimed by him for the quarter. By said section 403, for purposes of celerity and dispatch, a departure from the proclaimed exchange rate may be had when "the value so proclaimed varies by 5 per centum or more," a fact which obviously must be found in the first instance by the collector.

Said section 403 was reenacted as section 522 of the Tariff Acts of 1922 and 1930.

In view of this change in procedure in 1921 the contention of the Government that the Secretary of the Treasury had the power to either reject both rates certified by the Federal Reserve bank in the instant case or to determine which of the two rates was proper, is without merit. The Secretary's power is merely the ministerial one of pro- [fol. 117] claiming the estimated value. It is the opinion of the court that when the Federal Reserve Bank on the date of exportation of the instant merchandise, viz. May 3, 1940, certified two buying rates for pounds sterling, one denominated "free" and the other "official" it was the duty of the Secretary, under section 522 (c), *supra*, to publish both rates.

Nowhere in said section 522 (c) is the Secretary empowered to determine the legal rate of exchange. The certification of the Federal Reserve bank leaves no discretion on the part of the Secretary as to whether he shall

accept the rate or rates. It is true that under the general powers granted him over collectors of customs he could direct that either one of two rates certified should be used, but such instruction would not preclude judicial inquiry in order to determine which of the two rates certified was applicable.

We are not unmindful of the holding of the Supreme Court of the United States in the case of *Hadden* v. *Merritt*, 115 U. S. 25, 29 L. ed. 333, that alleged errors in the estimate of the value of foreign coins could not be shown in judicial proceedings to affect the rights of the Government or individuals. The question here presented is not an alleged error in the estimate of the value of the foreign currency, but the correctness of the action of the collector in selecting one of two rates estimated and certified by the Federal Reserve bank. The collector is the official charged with the duty of converting currency and he must look to the statute for his authority. Even where conversion was made under the order of the Secretary, as is the case here, such action has been held to be that of the collector and not the Secretary. See *United States* v. *Parkhurst & Co. et al.*, 12 Ct. Cust. Appls. 370, T. D. 40522, and *United States* v. *Lucius Beebe & Sons*, 122 Fed. 762.

The motion of Government counsel to dismiss this case on the ground that it presented no question over which this court had jurisdiction was denied, primarily because it was the opinion of the court that the ends of justice would best be served if the case were presented on the merits at which time the court would be in possession of all the facts and would be in a better position to decide the jurisdictional question. In view of what we have said above it is the opinion of the court that the questions presented are justiciable and that the motion was properly denied.

The court having decided that the Secretary's action in directing which of the rates certified was to be used by collectors of customs without regard to the circumstances of the importation or to the law of the country of export, was beyond the scope of his powers, we must look to the action of the collector and determine which of the rates certified and made public is applicable in the case before us. On May 3, 1940, the date of exportation of the instant [fol. 118] merchandise, this wool cloth was not covered by the Order in Council in effect at that time, requiring pay-

ments for certain exports to the United States to be made in either United States dollars or pounds sterling purchased in the United Kingdom from the Bank of England or an agent of such bank at the fixed British "official" rate of exchange. Therefore the action of the Secretary of the Treasury in arbitrarily directing the collector to select the "official" rate in converting the currency of the invoice in the instant case was unwarranted. It may be noted that the stipulation herein recites that the payment in this particular case was made at the exchange rate of $3.21. True, this rate of exchange has little bearing on the question presented; nevertheless it raises an inference that the currency of the invoice here involved was in pounds sterling which were convertible at the "free" rate.

For the foregoing reasons, in arriving at the proper basis under the statute, section 522 (c), *supra*, for conversion of the pound sterling in which this invoice is expressed, we hold that it was the duty of the collector to use the rate designated "free" certified by the Federal Reserve bank on the date of exportation, viz, 3.475138.

The conclusion we have arrived at is in conformity with the reasoning and holding of the court in *Henry P. Isham* v. *United States*, Abstract 46189 (Old Series); *A. J. Bracher Co.* v. *United States*, T. D. 47935, 68 Treas. Dec. 404; and *Macksoud Importing Co. et al.* v. *United States*, T. D. 48442, 70 Treas. Dec. 114, affirmed in *United States* v. *Macksoud Importing Co. et al.*, 25 C. C. P. A. (Customs) 44, T. D. 49041.

Judgment will be rendered in accordance with the above holding.

Ekwalco, J.

Concurring: Cline, J.; Keefe, J.

IN UNITED STATES CUSTOMS COURT, THIRD DIVISION

Suit No. 57467-K-1584-41

JOHN BARR, Plaintiff,

vs.

UNITED STATES, Defendant

JUDGMENT—July 30, 1943

This case having been duly submitted for decision to the Third Division of the United States Customs Court, and the [fol. 119] Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision.

It is hereby ordered, adjudged, and decreed that the protest in this case claiming that the currency of the invoice should have been converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under section 522 (c) of the Tariff Act of 1930, is sustained, and such buying rate is held to be $3.475138.

Genevieve R. Cline, William J. Keefe, Wm. A. Ekwall,
Judges of the United States Customs Court.

Dated at New York, N. Y., this the 30th day of July 1943.

[File endorsement omitted.]

[fol. 120] UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Tuesday, April 4, 1944

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 4th day of April, A. D., 1944.

Present: Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, Irvine L. Lenroot, and Joseph R. Jackson, Associate Judges.

The court was opened for business in due form.

Customs Appeal No. 4461

THE UNITED STATES, Appellant,

vs.

JOHN BARR, Appellee

Said appeal came on to be heard before the court and after hearing the arguments of counsel the cause was taken under advisement by the court.

[fol. 121] UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS, OCTOBER TERM, 1943

Customs Appeal No. 4461

Customs Calendar No. 34

THE UNITED STATES, Appellant,

vs.

JOHN BARR, Appellee

JACKSON, *Judge:*

On May 3, 1940 appellee (plaintiff below) imported a shipment of woolen fabrics from England to the United States at the port of New York. The merchandise was invoiced in pounds sterling. The consumption entry shows

a conversion of the pounds sterling to United States dollars at the rate of "4.035 official" per pound.

The importation was classified as woven fabrics under paragraph 1409 (a) of the Tariff Act of 1930. Concerning the classification there is no dispute.

The collector, following the instructions published in T. D. 50134 and T. D. 50146, converted the pounds sterling at the rate of $4.035 per pound.

The section of the Tariff Act of 1930 under which foreign currency is converted into currency of the United States reads as follows:

SEC. 522. Conversion of Currency.

(a) VALUE OF FOREIGN COIN PROCLAIMED BY SECRETARY OF TREASURY.—Section 25 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide [fol. 122] revenue for the Government, and for other purposes," as amended, is reenacted without change as follows:

"SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year."

(b) PROCLAIMED VALUE BASIS OF CONVERSION.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) MARKET RATE WHERE NO PROCLAMATION.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market

at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

Prior to March 25, 1940 the Federal Reserve Bank of New York, pursuant to section 522 (c), *supra*, certified daily to the Secretary of the Treasury a single rate of exchange for each of the currencies of foreign countries, including [fol. 123] the pound sterling. Subsequent to that date the said bank certified two rates of exchange for the pound sterling, one denominated "official" and the other "free."

On the date of exportation of the involved merchandise the bank certification was as follows:

Values of Foreign Currencies

[Value in U. S. Dollars]

Country	Monetary Unit	Noon buying rate for cable transfers in New York
Europe:		
• • •	• • •	• • •
England	Pound Sterling	$4.035000 Official.
England	Pound Sterling	$3.475138 Free.
• • •	• • •	• • •

The bank in a letter advised the Secretary of the Treasury that the dual rate certification was made by reason of information received that after March 25, 1940 all foreign exchange of certain countries, including the United States,

which was received in Great Britain would have to be surrendered to the Bank of England or its authorized agencies and that payment therefor would be made at a rate fixed by the British Treasury. The British Government had compiled a list of commodities which could be exported from Great Britain only after it had been shown that they were purchased either in the currency of one of the designated countries or with pounds purchased by such currencies from the Bank of England or one of its authorized agents at the rate fixed by the British Treasury.

Pursuant to section 522 (c) the Secretary of the Treasury issued on April 15, 1940 T. D. 50134, 5 F. R. 1447:

[fol. 124] *Conversion of currency—Canadian dollars, Newfoundland dollars, English pounds, Australian pounds*

Conversion rate for customs purposes of Canadian dollar, Newfoundland dollar, English pound and Australian pound

TREASURY DEPARTMENT, *April 15, 1940.*

To Collectors of Customs and Others Concerned:

Reference is made to the daily buying rates for foreign exchange which section 522 (c) of the Tariff Act of 1930 (U. S. C. title 31, sec. 372 (c)) directs the Federal Reserve Bank of New York to certify to the Secretary of the Treasury. The list of rates certified by the Federal Reserve Bank of New York has included two rates for the Canadian dollar and the Newfoundland dollar since March 22, 1940, two rates for the English pound since March 25, 1940, and two rates for the Australian pound since April 1, 1940. In each case the higher rate has been designated "official," the other "free."

Whenever it is necessary to convert any of the above-mentioned currencies into currency of the United States for the purpose of the assessment and collection of duties upon imported merchandise, customs officers shall make such conversions on the basis of the rate designated "official," unless the rate proclaimed for the respective currency pursuant to section 522 (a) of the Tariff Act of 1930 (U. S. C. title 31, sec. 372 (a)) varies from such "official" rate by less than 5 per centum. In the latter event the proclaimed rate should be used.

Until further notice only the "official" rates for the named currencies will appear in the weekly issues and bound vol-

umes of the TREASURY DECISIONS. The pertinent facts and circumstances will be kept under review and, should future developments make it advisable, further instructions will be given.

(342.211)

H. Morgenthau, Jr., Secretary of the Treasury.

The relevant portion of T. D. 50146, dated May 11, 1940, reads as follows:

Foreign currencies—Rates of exchange

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF CUSTOMS

Washington, D. C., May 11, 1940.

[fol. 125] *To Collectors of Customs and Others Concerned:*

The appended table of the values of certain foreign currencies as certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under the provisions of section 522 (c), Tariff Act of 1930, during the period from May 3 to 9, 1940, inclusive, is published for the information of collectors of customs and others concerned.

By direction of the Commissioner:

(342.211)

W. R. Johnston, Deputy Commissioner of Customs.

Values of Foreign Currencies Certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under Provisions of Section 522 (c), Tariff Act of 1930

Period May 3 to 9, 1940, Inclusive

Country	Name of Currency	May 3	• • •
Europe:		Dollars	
• • •	• • •	• • •	• • •
England	Pound sterling	[4] 4.035000	• • •
• • •	• • •	• • •	• • •
• • •			

[4] (Official or Controlled.) • • • The rates for Canadian dollars, Newfoundland dollars, English pounds, and Australian pounds included in this list are for use pursuant to the directions in T. D. 50134.

Appellee protested the action of the collector in converting the pounds sterling of the invoice as aforesaid and claimed that the collector should have converted at the "free" rate of exchange on the date of exportation.

At the trial before the United States Customs Court, Third Division, the Government moved to dismiss the protest on the ground that it presented a non-justiciable question and [fol. 126] further that the protest and the accompanying papers show on their faces that no cause of action was presented.

The motion was vigorously pressed and the sufficiency of the protest as vigorously defended in briefs and oral arguments. The trial court denied the motion. Subsequently, at the trial on the merits the Government renewed its motion to dismiss, and the motion was held to have been properly denied.

The trial court in its decision on the merits reviewed the facts in the case, which among other things disclosed that whiskey, tin, furs, jute, rubber, and (later) diamonds, could not be exported from Great Britain unless it was shown by the exporter that payment for such merchandise was made either in the currency of the importing country or at the "official" rate. The court found in favor of appellee, holding that it was the duty of the collector to convert at the rate designated "free" as certified by the Federal Reserve Bank even though the Secretary of the Treasury had "arbitrarily" directed the collector to select the "official" rate. Judgment was entered accordingly, from which this appeal was taken.

The Government here contends that the protest does not state a good cause of action; that the action of the Secretary of the Treasury in publishing and directing the use of the official rate of exchange as the proper rate is final and conclusive; that the certification of two rates on May 3, 1940 was either improper or incomplete, and that if improper both rates should have been rejected and the rate for the quarter proclaimed under section 522 (a), (88.2397) should have been used, and that if incomplete the Secretary should have acted as he did; and that, assuming the trial court was [fol. 127] correct in holding that it could review the action of the collector to determine whether or not he used the correct rate, the rate used by the collector was the correct one.

The appellant makes well-reasoned contentions as to why the protest does not state a good cause of action. However,

in view of the long continued holdings of this court we are of opinion that such contentions may not be upheld. In the case of *Carter* v. *United States*, 1 Ct. Cust. Appls. 64, T. D. 31033, this court quoted from the case of *Converse* v. *Burgess et al.*, 18 How. 413, as follows:

> We are not, therefore, disposed to exact any nice precison, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint and his design to make it the foundation of a claim against the Government.

In the *Carter* case, *supra*, the case of *Arthur* v. *Morgan*, 112 U. S. 495, was likewise referred to. That case approved the principal enunciated in the *Converse* case, *supra*. See also *Rice & Co. et al.* v. *United States*, 10 Ct. Cust. Appls. 165, T. D. 38403, affirmed 257 U. S. 536.

The protest herein gives notice of dissatisfaction with the decision of the collector for the reason that the currency of the invoice should have been "converted at the buying rate in the New York market at noon on the day of exportation of the merchandise, under Section 522 (a) * * *, such buying rate varying by more than 5 per centum from the rate proclaimed by the Secretary of the Treasury under the provisions of Section 522 (b)." The protest further stated that the assessment of duties and taxes was illegal and void. [fol. 128] It is our opinion that under the liberal construction placed upon protests as above noted the collector was advised of the complaint in appellee's protest, and it was sufficiently pointed out what appellee claimed the rate of conversion should be. The collector was not confused or uncertain, because his decision was reviewed and affirmed by him.

We agree with the contention of appellant that the direction of the Secretary of the Treasury that the rate of conversion should be the official rate was binding on the Collector of Customs at the port of New York in view of section 502 (c) of the Tariff Act of 1930, which provides as follows:

> (c) DUTIES OF CUSTOMS OFFICERS.—It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws;

and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs.

However, it is our opinion that the importer was entitled to protest because it was the collector's action against which the importer protested. There was in the instant case a variance of more than 5 per centum between the proclaimed value ($8.2397) and the published exchange rate ($4.035), which fact unquestionably was found by the collector, so that the case of *Fry & Friedsam* v. *United States*, 12 Ct. Cust. Appls. 486, T. D. 40694, relied on by appellee, is no precedent for his contention that the collector should have observed the difference in value of 5 per centum or more between the "official" and the "free" rates. The latter difference is not provided for by the statute.

Since it was the statutory duty of the collector to carry [fol. 129] into effect the instruction of the Secretary of the Treasury, the only review that can come before the courts is an inquiry as to whether or not such instruction was in conformity with the statute, section 522 (c). If such instruction shows upon its face that it conforms to the law, it is conclusive and binding, and furthermore is not subject to judicial inquiry as to its correctness. *J. K. Clarke* v. *United States*, 17 C.C.P.A. (Customs) 420, T. D. 43866.

We are of opinion that section 522 (c), *supra*, contemplates the finding of a single buying rate of exchange. This we think is obvious from a reading of the section. There is but one standard of currency in Great Britain; namely, the pound sterling. This is not controverted. If section 522 (c) were to be construed to mean that any number of buying rates on the New York market could be certified by the Federal Reserve Bank of New York, the ultimate result as far as tariff laws are concerned would obviously be "confusion worse confounded." Furthermore, anything in Great Britain could be purchased for pounds sterling converted at the "official" rate. Such is not the case with "free" pounds.

The Secretary of the Treasury published only the buying rate of pounds sterling at the "official" rate. That was *the all-inclusive* buying rate of pounds. Therefore, the publication by the Secretary of T. D. 50134 on its face con-

formed to the law and is conclusive and binding on the courts and will not be subject to judicial inquiry as to its correctness, and since the collector's action conforms to the direction of such decision it must be sustained.

It is not necessary to consider other contentions made herein, nor the history of the legislation leading up to the [fol. 130] present tariff statutes here involved in view of what has been said, nor is it necessary to discuss the many cases from the beginning of tariff history to the present time which have been cited by the parties.

For the reasons hereinbefore stated the judgment of the United States Customs Court is reversed.

Reversed.

Lenroot, Judge, sat during the argument of this case but resigned before the opinion was prepared.

[fol. 131] UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, May 22, 1944.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 22nd day of May, A. D., 1944.

Present: The Honorable Finis J. Garrett, Presiding Judge, and the Honorables Oscar E. Bland, Charles S. Hatfield, and Joseph R. Jackson, Associate Judges.

The court was opened for business in due form.

Customs Appeal No. 4461

THE UNITED STATES, Appellant,

v.

JOHN BARR, Appellee

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that the judgment of the United States Customs Court be, and the same is hereby, reversed, and said cause is remanded to said court for proper proceedings in conformity with the opinion of this court herein.

[fol. 132] CERTIFICATE RE MANDATE OF COURT OF CUSTOMS AND PATENT APPEALS

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 4461

THE UNITED STATES, Appellant,

v.

JOHN BARR, Appellee

The final mandate in the above-entitled appeal, consisting of a certified copy of the order of the court of the 22nd day of May, 1944, was issued to the United States Customs Court on the 28th day of June, 1944.

Arthur B. Shelton, Clerk.

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Court of Customs & Patent Appeals is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which acompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 48,740, U. S. Court of Customs and Patent Appeals, Term No. 287. John Barr, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 26, 1944. Term No. 287 O. T. 1944.

FILE COPY

No. 287

Office - Supreme Court, U. S.
FILED
JUL 20 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

JOHN BARR,

Petitioner,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

ALBERT MACC. BARNES,
Attorney for Petitioner.

J. BRADLEY COLBURN,
of Counsel.

July, 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

JOHN BARR,

Petitioner,

v.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioner John Barr prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals in *United States* v. *John Barr*, Customs Appeal No. 4461, entered May 22, 1944, reversing a judgment of the United States Customs Court rendered July 30, 1943.

Opinions Below

The opinion of the trial court (R. pp. 112-119) is reported in C.D. 801, weekly "Treasury Decisions", August 12, 1943, Volume 79 No. 7, page 14. The opinion of the Court of Customs and Patent Appeals (R. pp. 120-129) is reported as C.A.D. 279, weekly "Treasury Decisions", July 6, 1944, Volume 79, No. 54, page 28.

Jurisdiction

The judgment of the Court of Customs and Patent Appeals was entered on May 22, 1944 (R. p. 128). This petition is filed under Rules 42 and 38 of the Rules of this Court, pursuant to Section 195 of the Judicial Code as amended (U.S.C., Title 28, Section 308), providing that:

> "* * * in any case in which the judgment or decree of the Court of Customs and Patent Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the application of either party, duly made as required by Section 350 of this title, to require, by certiorari or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The statutes involved are Section 522 of the Tariff Act of 1930 (46 Stat. 739, U.S.C., Title 31, Section 372) and Section 514 of said Tariff Act of 1930 (46 Stat. 734, U.S.C., Title 19, Section 1514). These statutes are set forth in full in the appendix hereto (pages 10 to 12).

Statement

Said Section 522 prescribes the statutory method for determination of values of foreign currency for assessment and collection of duties upon imported merchandise. Sub-section (c) thereof provides that conversion of foreign currency shall be made at a value measured by the buying rate in the New York market at noon on the day of exportation of the imported merchandise, where, as in this case, the proclaimed value of such currency varies by 5 per centum or more from such buying rate. Such buying rate is defined to be the buying rate for cable

transfers payable in the foreign currency to be converted, and is required to be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who in turn "shall make it public at such times and to such extent as he deems necessary" (App., p. 11).

Said Section 514 grants to importers and other interested parties the right to file protests against all decisions of Collectors of Customs, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable on imported merchandise and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury (App., p. 11).

The Federal Reserve Bank had determined and certified one buying rate of exchange for pounds sterling under said Section 522 (c) until March 25, 1940 (Stipulation, paragraph 6—R., p. 76). Effective on that date, the Government of the United Kingdom, by specific regulation, required payment for whiskey, furs, tin, rubber, and jute, exported to the United States, to be made in either United States dollars or with pounds sterling purchased from the Bank of England or an authorized dealer of such Bank at the "official" rate of exchange fixed by the British Treasury (Stipulation, paragraph 4—R., p. 75; Exhibit 4—R., p. 100). Thereupon, beginning March 25, 1940, the Federal Reserve Bank determined there were two buying rates of exchange for pounds sterling for the purposes of said Section 522 (c) and accordingly certified such two rates to the Secretary of the Treasury (Stipulation, paragraph 8—R., p. 76; Exhibit 7—R., p. 108). One of such rates was denominated "free", which the Bank stated represented the buying rate it had theretofore certified, and the second and higher rate was called "official", the Bank stating this was the rate fixed by or on behalf of the British Treasury (Exhibit 6—R., p. 107).

Customs regulations in effect on the date of exportation of the involved woolens required buying rates certified by the Federal Reserve Bank to be furnished to customs officers by the Customs Information Exchange for purposes of conversion of currency (Stipulation, paragraph 11—R., p. 77). Pursuant to such regulations, the said Customs Information Exchange furnished daily to customs officers, to customs brokers, and to importers concerned a statement of buying rates certified by the Federal Reserve Bank. For the date of exportation of the involved woolens buying rates so furnished included for pounds sterling a "free" buying rate of $3.475138 and an "official" buying rate of $4.035 (Stipulation, paragraph 11—R., p. 77; Exhibit 8—R., p. 119). Each of these rates varied by more than 5 per centum from the value estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury for pounds sterling under Section 522 (a) and (b). (Stipulation, paragraph 9—R., p. 76).

The Secretary of the Treasury issued instructions to customs officers to use only the "official" buying rate in converting all invoices of merchandise made out in pounds sterling (Treasury Decision 50134, Treasury Decisions, Volume 75, page 370; 5 Federal Register, 1447).

Petitioner imported certain woolens from the United Kingdom which were purchased and paid for with pounds sterling exchange covered by the "free" rate certified by the Federal Reserve Bank. (Stipulation, paragraph 10, R., p. 76). On liquidation of the entry the Collector of Customs at New York, pursuant to said instructions of the Secretary, converted the invoice currency, pounds sterling, into currency of the United States for assessment and collection of tariff duties at the "official" rate of exchange, to wit, $4.035. (Stipulation, paragraph 12—R., p. 77).

Petitioner filed protest against the Collector's action under Section 514 of the Tariff Act of 1930, claiming the currency of his invoice should have been converted at the "free" rate of exchange, which, on the day of exportation herein, was $3.475138 (R., p. 5).

The Customs Court, in sustaining petitioner's protest, held that under prior decisions of this Court both the "free" and "official" buying rates for pounds sterling certified by the Federal Reserve Bank, were final and conclusive upon all parties; that under the facts of this case both such rates had separate application and must be given effect in accordance with the nature of the merchandise imported; that the certification by the Federal Reserve Bank left no discretion to the Secretary as to whether he shall accept the rates; and that, while the Secretary could direct Collectors to use either one of two rates certified, such instruction would not preclude judicial inquiry to determine which of the two rates certified was applicable (R., pp. 112-118).

The Court of Customs and Patent Appeals, in reversing this decision, held that, as the Secretary of the Treasury had published a single rate of exchange certified by the Bank, such publication on its face conformed to the law, was final and conclusive, and was not subject to judicial inquiry as to its correctness (R., p. 127). That court stated in the course of its opinion that Section 522 (c) contemplates the determination of a single buying rate of exchange (R., p. 127).

Questions Presented

1. Are buying rates of exchange determined and certified by the Federal Reserve Bank under Section 522 (c) of the Tariff Act of 1930 binding and conclusive on all parties, including importers, customs officers, and the Secretary of the Treasury?

2. Does the Secretary of the Treasury possess any discretionary or other power under said Section 522 (c) to disregard or nullify buying rates determined and certified by the Federal Reserve Bank under that section?

3. Does the Federal Reserve Bank under said Section 522 (c) possess power to determine and certify two buying rates for pounds sterling under the facts of this case?

4. Does the Federal Reserve Bank possess power under said Section 522 (c) to determine and certify only one buying rate for pounds sterling and, if so, and that Bank having certified two rates, do the courts have power to pass upon the correctness of the selection of one of such rates by Collectors of Customs?

5. Does the fact that the Collector of Customs' action in using the "official" rate of exchange in the instant case was pursuant to instruction of the Secretary of the Treasury preclude the courts from determining the legality of the Collector's action?

Reasons for Granting Writ

1. The record herein discloses a conflict between the Federal Reserve Bank of New York and the Secretary of the Treasury in interpretation of the respective powers and duties of each under Section 522 (c) of the Tariff Act of 1930. The Federal Reserve Bank has construed said statute to require or authorize it under the facts of the case at bar to certify more than one buying rate for cable transfers payable in pounds sterling when such exchange rates are applicable respectively to distinct classes of commodities in payment for which such cable transfers were to be employed. The Secretary of the Treasury construes said law to mean that only one rate may be lawfully certified under the statute and that if more than one shall have been certified, the final selection and de-

termination of a buying rate is delegated to him and that he may set aside or nullify any other rate previously determined and certified by the Federal Reserve Bank. Proper and efficient administration of Section 522 (c) and the public interest require that this conflict be resolved by exercise of this Court's power of review.

2. The case involves the assessment and collection of tariff duties on merchandise subject to ad valorem duties imported into the United States from the United Kingdom. The rule of the case would likewise affect imports into the United States from other foreign countries, including Canada, Argentina, Australia, Brazil, Uruguay, Newfoundland, and China. The questions involved are of general importance not only to foreign trade of the United States with the countries named, but to importers, American manufacturers, and the general public.

3. From 1789 until 1873, the values of foreign coins and currencies for customs computations were established by acts of Congress. From 1873 until 1894, statutes in force provided that conversion of foreign currency for duty purposes should be made on the basis of the pure metal value of the foreign coin in circulation in various foreign countries as expressed in United States money. Such values were required to be estimated by the Director of the Mint and to be proclaimed by the Secretary of the Treasury. The values so determined were held to be final and conclusive and not subject to collateral attack or judicial review. *Cramer* v. *Arthur*, 102 U. S. 612. *Hadden* v. *Merritt*, 115 U. S. 25. *United States* v. *Klingenberg*, 153 U. S. 93.

4. Section 25 of the Act of August 27, 1894 (28 Stat. 552) reenacted the provision for determination of pure metal value of foreign coin by the Director of the Mint and proclamation thereof by the Secretary of the Treasury and added a new provision which gave to the Secre-

tary of the Treasury authority to order reliquidation of any entry at a value different from the proclaimed value whenever satisfactory evidence was produced to him showing that the value in United States currency of the invoice money was at the time of certification ten per centum more or less than such proclaimed value. This proviso was recognized as vesting the Secretary of the Treasury with discretionary power. *United States* v. *Whitridge*, 197 U. S. 135; *30 Opinion Attorney General 450.*

5. Section 522 (c) of the Tariff Act of 1930 is a reenactment of Section 522 (c) of the Tariff Act of 1922 (42 Stat. 974) and was first enacted as Section 403 of the Act of May 27, 1921 (42 Stat. 17). Said Section 403 of the Act of 1921 repealed the proviso to the Act of 1894 and introduced a wholly new method of currency conversion whereby Congress substituted for the determination of exchange values by the Secretary of the Treasury determination by the Federal Reserve Bank of New York of buying rates of exchange in the New York market at noon on the day of exportation.

The decision of the Court of Customs and Patent Appeals restores to the Secretary of the Treasury a discretionary power similar to that which he possessed under the proviso to the Act of 1894 and which Congress specifically took away.

6. Section 522 (c) of the Act of 1930, providing that the Secretary of the Treasury shall make public the buying rates determined by the Federal Reserve Bank, limits the power of the Secretary thereunder to the function of publication. The assertion by the Secretary of a right to choose the certified rates which shall be published and to direct which certified rates shall be used by customs officers, is the assertion of a power and discretion to determine values of foreign currency exchange in United States money which the statute does not confer upon him.

7. Under the decision of the Court of Customs and Patent Appeals the Secretary of the Treasury may set aside or refuse to give effect to buying rates of exchange determined by the Federal Reserve Bank in accordance with the statutory formula and no judicial review is possible of such action.

Section 514 of the Tariff Act of 1930 provides expressly for judicial review of all decisions of collectors including legality of all orders and findings entering into the same. The instruction of the Secretary of the Treasury is such an order. The decision of the Court of Customs and Patent Appeals limiting judicial review to determination whether the Secretary's order is on its face in conformity with the law, destroys this statutory judicial process established by Congress for tariff questions.

8. The decision of the Court of Customs and Patent Appeals is the first judicial construction of Section 522 (c) of the Tariff Act of 1930. That decision leaves in doubt not only the powers and duties of the Federal Reserve Bank and the Secretary of the Treasury thereunder, but also the right of importers to obtain judicial review of administrative action concerning importations into the United States. Questions involved are of general importance and have not been but should be passed upon by this Court.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ALBERT MACC. BARNES,
Attorney for Petitioner.

J. BRADLEY COLBURN,
of Counsel.

July, 1944.

Appendix

Act of June 17, 1930, c. 497, Title IV, Sec. 522, 46 Stat. 739 (U.S.C., Title 31, Sec. 372):

"SEC. 522. CONVERSION OF CURRENCY.

(a) VALUE OF FOREIGN COIN PROCLAIMED BY SECRETARY OF TREASURY.—Section 25 of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' as amended, is reenacted without change as follows:

'SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year.'

(b) PROCLAIMED VALUE BASIS OF CONVERSION.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of Section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) MARKET RATE WHEN NO PROCLAMATION.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the pur-

poses of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve Bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange."

Act of June 17, 1930, c. 497, Title IV, Sec. 514, 46 Stat. 734 (U.S.C., Title 19, Sec. 1514):

"SEC. 514. PROTEST AGAINST COLLECTOR'S DECISIONS.

Except as provided in subdivision (b) of Section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the Collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer,

consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the Collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the Collector upon any question not involved in such reliquidation."

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No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

JOHN BARR, PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR PETITIONER

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New York, November 27, 1944.

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Customs Court (R. pp. 134-142) is reported in C. D. 801, "Treasury Decisions" advance sheets, August 12, 1943, Volume 79, No. 7, page 14. The opinion of the Court of Customs and Patent Appeals (R. pp. 145-154) is reported in 143 Fed. (2d), 132, C. A. D. 279, "Treasury Decisions" advance sheets, July 6, 1944, Volume 79, No. 54, page 28.

Jurisdiction

The judgment of the Court of Customs and Patent Appeals was entered May 22, 1944 (R. p. 153). The petition for a writ of certiorari was filed on July 26, 1944, and was

granted on October 9, 1944 (R. p. 155). Jurisdiction of this court is invoked under Section 195 of the Judicial Code, as amended (U. S. C., Title 28, Section 308).

Statutes Involved

The statutes involved are Section 522 of the Tariff Act of 1930 (46 Stat., 739, U. S. C., Title 31, Section 372) (Appendix p. 33), and Section 514 of said Tariff Act of 1930 (46 Stat., 734, U. S. C., Title 19, Section 1514) (Appendix p. 34).

Statement

Section 522 of the Tariff Act of 1930 prescribes the statutory method for determination of values of foreign currency for assessment and collection of duties upon imported merchandise. Subsection (a) thereof provides that the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value, and that the values of standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly.

Subsection (b) provides that for the purpose of assessment and collection of duties upon imported merchandise conversion of foreign currency into currency of the United States shall be made at the values proclaimed by the Secretary.

Subsection (c) of said Section 522 provides that if the value defined by subsection (a) has not been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion of foreign currency shall be made at a value

measured by such buying rate. Such buying rate is defined to be the buying rate for cable transfers payable in the foreign currency to be converted and is required to be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who in turn "shall make it public at such times and to such extent as he deems necessary."

The merchandise consists of woolen fabrics exported from the United Kingdom to the United States on May 3, 1940, and invoiced and appraised in pounds sterling. (Stipulation, pars. 1 & 2, R. p. 88.)

On September 3, 1939, coincident with the outbreak of war, the United Kingdom adopted certain regulations which provided that exchanges of dollars and pounds sterling in the United Kingdom should thereafter be made only through the Bank of England or an authorized dealer, i.e., a person authorized by the British Treasury to deal in foreign currency (Stipulation, paragraph 3—R. p. 88; Exhibit 1, R. pp. 92, 98; offered, R. p. 41; Exhibit 2, R. pp. 103, 105, offered, R. p. 41; Exhibit 3, R. pp. 106, 112, offered R. p. 41). The rates fixed by the British Treasury under said regulations for exchange of dollars and pounds sterling in the United Kingdom were from September 3, 1939 to September 13, 1939, $4.06 per pound sterling; from September 14, 1939 to January 7, 1940, $4.04 per pound sterling; and from January 8, 1940 to the present time, $4.035 per pound sterling (Stipulation, paragraph 3—R. p. 89).

Effective March 25, 1940, the British Government required that payment for certain specified exports to the United States be made in either United States dollars or with pounds sterling purchased from the Bank of England or an authorized dealer of such Bank at the fixed British "official" rate of exchange (Stipulation, paragraph 4—R. p. 89; Exhibit 4—R. p. 120; offered R. p. 42). The exports specified in such order were whiskey, furs, tin,

rubber and jute in various forms. Woolens such as those included here were not within the scope of this regulation.

Prior to March 25, 1940, the Federal Reserve Bank, in determining and certifying buying rates of exchange under Section 522 (c) took no cognizance of the British "official" fixed rate of exchange and determined and certified one buying rate of exchange, to wit, the "free" or uncontrolled buying rate for cable transfers in the New York market (Stipulation, paragraph 6—R. p. 89). Beginning on March 25, 1940, however, when the British Government required payment for whiskey, furs, tin, rubber, and jute products, exported to the United States, to be made in dollars or in pounds purchased at the British "official" fixed rate of exchange, the Federal Reserve Bank began to certify under Section 522 (c) two buying rates of exchange for pounds sterling (Stipulation, paragraph 8—R. p. 90; Exhibit 7—R. p. 130, offered, R. p. 42). One of such rates was denominated "free" which the Bank stated represented the single buying rate it had theretofore certified, and the second and higher rate was called "official", the Bank stating this was the rate fixed by or on behalf of the British Treasury (Exhibit 6—R. p. 128, offered, R. p. 42).

Customs regulations in effect on the date of exportation of the involved woolens required buying rates certified by the Federal Reserve Bank to be furnished to customs officers by the Customs Information Exchange[1] for purposes of conversion of currency (Stipulation, paragraph 11—R. p. 91). Pursuant to such regulations, the said Customs Information Exchange furnished daily to custom officers, to customs brokers, and to importers concerned a statement of buying rates certified by the Federal Reserve Bank (Stipulation, par. 11, R. p. 91). On the date of

[1] The Customs Information Exchange is used "by the customs service as a medium to disseminate information". Customs Regulations, 1937, Art. 1402.

exportation of the involved woolens the rates so furnished were, for pounds sterling, a "free" buying rate of $3.475138 and an "official" buying rate of $4.035 (Exhibit 8—R. p. 132, offered, R. p. 43). Each of these rates varied by more than 5 per centum from the value of $8.2397 estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury for pounds sterling under Section 522 (a) and (b) (Stipulation, paragraph 9—R. p. 90).

In Treasury Decision 50134 of April 15, 1940, addressed to Collectors of Customs and others concerned, the Secretary of the Treasury referred to the fact that the Federal Reserve Bank of New York was certifying under Section 522 (c) a "free" rate and an "official" rate for pounds sterling and directed that for the purpose of assessment and collection of duties upon imported merchandise invoiced in pounds sterling, customs officers should make all conversions on the basis of the rate for pounds sterling designated "official". It was further stated that until further notice only the said "official" rate would be published in "Treasury Decisions". (Treasury Decision 50134, "Treasury Decisions", Volume 75, page 370; 5 Federal Register, 1447; Appendix, page 35).

The woolens herein were purchased and paid for with pounds sterling purchased in the New York market for cable transfers and were not obtained directly or indirectly from the Bank of England or an authorized dealer of such Bank (Stipulation, par. 10, R. p. 90). On liquidation of the entry the Collector of Customs at New York, pursuant to said instructions of the Secretary, converted the pounds sterling of the invoice into currency of the United States for assessment and collection of tariff duties at the "official" rate of exchange of $4.035 (Stipulation, paragraph 12—R. p. 91).

Section 514 of the Tariff Act of 1930 grants to importers and other interested parties the right to file pro-

test against all decisions of Collectors of Customs, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury.

Petitioner filed protest against the Collector's action under said Section 514, claiming the currency of his invoice should have been converted at the "free" rate of exchange, which, on the day of exportation herein, was $3.475138 (R., p. 6). The Customs Court, in sustaining petitioner's protest, held that under prior decisions of this court both the "free" and "official" buying rates for pounds sterling certified by the Federal Reserve Bank were final and conclusive upon all parties; that under the facts of this case both such rates had separate application and must be given effect in accordance with the nature of the merchandise imported; that the certification by the Federal Reserve Bank left no discretion to the Secretary as to whether he should accept the rates; and that, while the Secretary could direct Collectors to use either one of two rates certified, such instruction would not preclude judicial inquiry to determine which of the two rates certified was applicable (R. pp. 134-142).

The Court of Customs and Patent Appeals, in reversing this decision, held that as the Secretary of the Treasury had published a buying rate of exchange certified by the Bank, such publication on its face conformed to the law, was final and conclusive, and was not subject to judicial inquiry as to its correctness (R. p. 152). That court stated in the course of its opinion that Section 522 (c) contemplates the determination of a single buying rate of exchange (R. p. 152).

Specification of Errors to Be Urged.

The Court below erred:

1. In holding that the instruction of the Secretary of the Treasury to Collectors of Customs to use only the "official" rate of exchange in converting all pounds sterling invoices on its face conformed to the law and was, therefore, conclusive and binding.

2. In failing to hold that the Secretary of the Treasury possesses no discretionary or other power under said Section 522 (c) to disregard or nullify buying rates determined and certified by the Federal Reserve Bank under that section.

3. In holding in effect that the decision of the Collector of Customs, pursuant to instruction of the Secretary of the Treasury to convert the pounds sterling of the involved invoice at the "official" rate of exchange instead of at the "free" rate of exchange, was not subject to judicial review.

4. In failing to hold that buying rates of exchange determined and certified by the Federal Reserve Bank under Section 522 (c) of the Tariff Act of 1930 are binding and conclusive on all parties, including importers, customs officers, and the Secretary of the Treasury.

5. In failing to consider the history of currency legislation and prior decisions of this court thereunder.

6. In failing to hold that buying rates of exchange determined by the Federal Reserve Bank under Section 522 (c) must be given effect in any instance where import transactions are established to be in currency for which such buying rates have been determined and certified.

7. In holding that the "official" rate of exchange was the all-inclusive buying rate of pounds sterling and was, therefore, the rate properly published by the Secretary of the Treasury and used by the Collector of Customs in converting the currency of the invoice at bar.

8. In failing to hold that the Collector of Customs should have converted the currency of the involved invoice at the "free" buying rate of exchange determined and certified by the Federal Reserve Bank for the date of exportation herein.

9. In reversing the judgment of the Customs Court.

Summary of Argument

I

Section 522 (c), Tariff Act of 1930 vests in the Federal Reserve Bank the discretionary power to determine buying rates of exchange. The Secretary of the Treasury possesses the purely ministerial function of publishing the rates determined by the bank.

Congress has defined the buying rate, and its direction that the buying rate determined by the Federal Reserve Bank shall be used in all cases where applicable is mandatory. The refusal of the Secretary to publish the "free" rate for pounds sterling duly certified to him and his direction to ignore and give no effect to such rate cannot defeat this plain Congressional mandate.

Said Section 522 (c) requires that all rates determined and certified to the Secretary by the Federal Reserve Bank shall be made public. The failure of the Secretary to publish the "free" rate of exchange and his direction to customs officers to give force and effect only to the "official" rate of exchange shows on its face that the Secretary's action did not conform to the law and is hence illegal.

II

The fact that the Collector liquidated the involved entry at the wrong rate of exchange pursuant to instruction of the Secretary does not prevent judicial review of such illegal action.

Section 514 of the Tariff Act of 1930 gives importers the right to protest and obtain subsequent judicial review of all decisions of collectors including the legality of all orders and findings entering into the same. Said Section 514 gives the express right of protest and review and the fact that the collector failed to use the proper rate of exchange in pursuance of instructions of the Secretary cannot defeat the right which Congress has given.

III

The history of prior currency legislation and decisions of this court thereunder establish that conclusive force and effect has been extended to findings of values or rates of exchange by the fact-finding body to which Congress has delegated such power. In the case at bar, the Congress delegated such power to the Federal Reserve Bank and rates of exchange determined by that official instrumentality are final and conclusive on all parties and must be given full force and effect.

Both the "free" rate and the "official" rate determined and certified by the Federal Reserve Bank have vitality and force and each is tied up with certain classes or types of merchandise—the "official" rate with whiskey, furs, tin, rubber and jute products, and the "free" rate with all other merchandise, including the imported woolens.

While Section 522 (c) refers to "the buying rate", it is well settled that where necessary to effectuate the legislative intent words importing the singular only will be applied to the plural of persons and things. The Congress

has authorized the Federal Reserve Bank to determine buying rates of exchange to carry out the policy of Congress, and the exercise of the judgment of such bank that certification and application of both a "free" rate and an "official" rate for pounds sterling was necessary to effectuate the Congressional intention is final.

If, however, the court shall determine that the Federal Reserve Bank had power to determine and certify only one rate of exchange, then the rate which must be given force and effect is the "free" and uncontrolled buying rate of exchange.

IV

The imported woolens were purchased and paid for with pounds sterling convertible at the "free" rate of exchange, and the involved invoice currency should accordingly have been converted by the Collector at the "free" rate determined and certified by the Federal Reserve Bank for the date of exportation herein, to wit, $3.475138.

ARGUMENT

I

The Secretary of the Treasury possesses no power under Section 522 (c) to disregard or nullify buying rates determined and certified by the Federal Reserve Bank, and his instructions contained in Treasury Decision 50134 are void.

The Court of Customs and Patent Appeals seems to have rested its decision upon the finding that as the Secretary of the Treasury published in "Treasury Decisions" the "official" rate which had been certified by the Federal Reserve Bank, the publication on its face conformed to the law and was conclusive and binding as to its correctness.

and as the Collector followed the Secretary's instruction to use only this rate his decision must be sustained. In so holding that court completely ignored the fundamental proposition that Section 522 (c) commits to the Federal Reserve Bank determination of rates of exchange, and that the authority and duty of the Secretary of the Treasury thereunder is the purely ministerial one of making public buying rates determined by the Federal Reserve Bank. Section 522 reads as follows:

"SEC. 522. CONVERSION OF CURRENCY.

(a) VALUE OF FOREIGN COIN PROCLAIMED BY SECRETARY OF TREASURY.—Section 25 of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' as amended, is reenacted without change as follows:

'SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year.'

(b) PROCLAIMED VALUE BASIS OF CONVERSION.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) MARKET RATE WHEN NO PROCLAMATION.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market

at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange."

The above wording is clear and unambiguous. It provides that foreign currency shall be converted into currency of the United States at the value estimated quarterly by the Director of the Mint and proclaimed by the Secretary of the Treasury. If such proclaimed value, however, varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion of the currency is required to be made at a value measured by such buying rate.

The requirement that conversion be made at a value measured by the buying rate is mandatory in any case where the variation of 5 per centum or more from the proclaimed value is found to exist. Both the "free" and "official" rates herein vary by more than 5 per centum from the proclaimed value of the pound sterling.

Congress defined the buying rate to mean the buying rate for cable transfers payable in the foreign currency to be converted. The power to determine such buying rates was vested solely in the Federal Reserve Bank in the lan-

guage "shall be determined by the Federal Reserve Bank of New York". Section 522 (c) further specifies certain factors which the Federal Reserve Bank "may in its discretion" take into consideration in determining the buying rate.

The statute makes an important distinction between the duties of the Secretary of the Treasury under subdivisions (b) and (c). Subdivision (b) provides that conversion of currency thereunder "shall be made at the values proclaimed by the Secretary of the Treasury." Under subdivision (c), however, the statute directs that conversion of currency shall be made at a value measured by the buying rate which "shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public", etc. Unlike subdivision (b), subdivision (c) does not limit the value or rate to be applied to that proclaimed or published by the Secretary. It clearly means that the buying rate to be used shall be that determined by the Federal Reserve Bank. This must apply, whether or not the rate determined and certified to the Secretary is made public by him. Certainly the Secretary can not overcome the plain provisions of existing law by withholding publication in "Treasury Decisions" of a buying rate determined by the Federal Reserve Bank or by directing customs officers to use some other and different rate.

The record establishes that both a "free" rate and an "official" rate for pounds sterling were determined by the Federal Reserve Bank and certified to the Secretary daily. In Treasury Decision 50134 the Secretary referred to this fact and stated his intention thereafter to publish only the "official" rate. His subsequent publications conformed to this statement, as exemplified in Treasury Decision 50146 (Treasury Decisions, Vol. 75, p. 388, Appendix, p. 36). Said Treasury Decision 50146 sets forth only the "official" rate of exchange for the date of exportation herein.

May 3, 1940, and directs that such rate shall be used pursuant to the Secretary's instructions in Treasury Decision 50134. The refusal of the Secretary to publish the "free" rate and his direction to customs officers to give such rate no force and effect shows on its face that his instruction and subsequent publication of rates did not conform to the law.

The Congress clearly intended that buying rates determined under Section 522 (c) should be made public when it provided that the buying rate determined by the Federal Reserve Bank should be certified daily to the Secretary of the Treasury, "who *shall* make it public * * *". This purpose is made manifest, if resort may properly be made to the views expressed by the Committee on Finance in proposing the adoption of Section 403 of the Emergency Tariff Act of 1921 (42 Stat. 17), the antecedent of the present law. The Committee said (Senate Report No. 16, 76th Congress, 1st Session, p. 16):

> "The Federal reserve bank of New York is authorized to determine the buying rate and the proposed amendment provides that the buying rate shall be the buying rate for cable transfers payable in the foreign currency to be converted. The section requires the Federal reserve bank of New York to certify the exchange rates to the Secretary of the Treasury daily *and requires the Secretary to make such rates public* for the use of the collectors and appraising officers in assessing duties." (Italics ours.)

The Congress imposed no limitation upon its direction to publish rates certified by the Federal Reserve Bank, the Secretary being authorized only to select the medium or means of publication in the language "make it public at such times and to such extent as he deems necessary". This latter provision does not, of course, modify or alter in any degree the flat direction of the Congress that the currency shall be converted at the applicable buying rate. Such a ministerial function can not be broadened into a

discretionary power of the Secretary of the Treasury to select or suppress or vary buying rates determined by the Federal Reserve Bank in accordance with the statute. The sole and only function of the Secretary is to make such rate or rates as are certified daily to him by the Federal Reserve Bank "public at such times and to such extent as he deems necessary".

The "free" rate of exchange, determined and certified by the Federal Reserve Bank, was furnished to the Collector of Customs by the Customs Information Exchange in compliance with Article 822 (d) of the Customs Regulations of 1937 which provided:

> "Rates of exchange for the principal foreign currencies as certified daily by the New York Federal Reserve Bank will be furnished daily by the customs information exchange to customs officers in the number of copies required, and liquidation will not be made until such Federal reserve bank rates are received. In special cases, or where a rate of currency does not appear on the daily list furnished, the collector will request such rate from the customs information exchange. * * *"

See stipulation, paragraph 11 (R. p. 91; Exhibit S, R. p. 132, offered, R. p. 43).

The Secretary's instruction to collectors in Treasury Decision 50134 to use only the "official" rate made no reference to the above quoted customs regulation.

The fact that the Collector of Customs liquidated the involved entry at the "official" rate of exchange pursuant to instruction of the Secretary, does not make his action final and conclusive and prevent judicial review. The Court of Customs and Patent Appeals held that since the Collector's action conformed to the Secretary's instruction, it must be sustained. In so holding, that court gave no consideration to the express provisions of Section 514 of the Tariff Act of 1930 providing for judicial review in just such instances.

II

The decision of the Collector pursuant to instruction of the Secretary to liquidate involved entry at "official" rate of exchange is subject to judicial review.

Express provisions of existing law clearly provide for a review of the Collector's action herein, including the validity of the order of the Secretary upon which the Collector's decision was based.

Section 514 of the Tariff Act of 1930, set forth in full in the Appendix at page 34 hereof, provides in part as follows:

> "* * * all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), * * * and his liquidation or reliquidation of any entry, * * * shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, * * * file a protest in writing with the collector * * *."

This statute clearly makes all decisions of Collectors as to the rate or amount of duty chargeable upon imported merchandise subject to protest. The statute further specifies that such protest may be directed against the legality of orders and findings entering into decisions of the Collector. The instruction of the Secretary to use only the "official" rate of exchange entered into the decision of the Collector and the statute makes the Collector's action based thereon subject to protest and subsequent review by

the Customs Court. In a case arising under the Tariff Act of 1913 (38 Stat. 187), the Court of Customs and Patent Appeals construed the protest section of that act as follows:

> "As the statutes confer on the importer only, the right to protest against the *decision of the collector* fixing the rate and amount of duties, chargeable upon imported merchandise, it follows that he has no right to protest against a liquidation which is not the decision of the collector but that of the Secretary. To preserve the importer's right of protest, therefore, *liquidations ordered by the Secretary must be regarded as decisions of the collector.* To hold otherwise would leave the importer remediless against every reliquidation ordered by the Secretary. Reliquidations made by the collector on orders by the Secretary are collectors' decisions; and such liquidations, like any other liquidation made by the collector, may be questioned by protest." (Second italics ours.)
>
> *United States* v. *Parkhurst, et al.*, 12 Ct. Cust. Appls. 370, 372, of 1924.

In *United States* v. *Lucius Beebe & Sons*, 122 Fed. 762, of 1903, the Circuit Court of Appeals for the First Circuit, in considering the opposition raised to the jurisdiction of the Board of General Appraisers (now the Customs Court) to pass upon rulings by the Secretary of the Treasury under Section 14 of the Act of June 10, 1890 (26 Stat. 138), said in part, at pages 769, 770:

> "The United States rest on the words 'decision of the collector,' found in section 14, and they claim that in the case at bar the 'decision' was not that of the collector of Boston, but of the Secretary of the Treasury. This is a narrow construction of the expression, because the ultimate tribunal which reliquidated was no. the Secretary, but the collector, so that at common law mandamus would lie only against the latter, and not against the former. This position, moreover, begs the question, because, *if the action of the Secretary was unlawful, as we hold it was, the*

collector could rest nothing done by him on that action, *and whatever he did was his own.*" (Italics ours.)

The Court of Customs and Patent Appeals in the *Parkhurst* case, *supra*, and the Circuit Court of Appeals in the *Beebe* case, *supra*, came to the conclusion that a decision of the Collector was subject to review when based upon an instruction of the Secretary, despite the fact that the Act of 1913 and the Act of 1890, there under consideration, did not include the provision found in the existing protest Section 514 "including the legality of all orders and findings entering into the *same*".

It would be a curious thing if Congress, after clearly defining the right of an importer to protest all decisions of the Collector, including the legality of all orders and findings entering into such decisions, had empowered the Secretary to defeat totally the right which Congress had granted. The law gives the right and such right cannot be defeated by an instruction of the Secretary which ignores the plain terms of the law. In *Campbell* v. *United States*, 107 U. S. 407, this court passed upon the power of the Collector to act under explicit directions of the Secretary of the Treasury under the fourth section of the Act of August 5, 1861 (12 Stat. 292). The court said in part, at pages 410-412:

> "It would be a curious thing to hold that Congress, after clearly defining the right of the importer to receive drawback upon subsequent exportation of the imported article on which he had paid duty, had empowered the Secretary by regulations, which might be proper to secure the government against fraud, to defeat totally the right which Congress had granted. If the regulations of themselves worked such a result, no court would hesitate to hold them invalid as being altogether unreasonable."
>
> "But the regulations in this case are not unreasonable. Nor do they interpose any obstacle to the full assertion and adjustment of plaintiffs' right. It is the order of the Secretary of the Treasury forbidding the

collector to proceed under these regulations or in any other mode, which is the real obstacle. Is that order a defense to this action? Can the Secretary, by this order, do what he could not do by regulations, repeal or annul the law? Can he thus defeat the law he was appointed to execute, by making regulations and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?"

* * * * * * * * *

"The Court of Claims makes the mistake of supposing that the claim is founded on the regulations of the Secretary of the Treasury. This view cannot be sustained. It is the *law* which gives the right, and the fact that the customs officers refuse to obey these regulations cannot defeat a right which the Act of Congress gives."

* * * * * * * * *

"It is an error to suppose that the officers of customs, including the Secretary, are in regard to this law created a special tribunal to ascertain and decide conclusively upon the right to drawback. Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's right so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry, they simply ascertain quantities, identify and mark packages, accept bonds and sureties, see that the exported article leaves the port in the ship. These and like duties being discharged, it is the collector's duty, a mere ministerial function, to give the certificate of drawback. The amount of it is fixed at seventeen cents per hundred pounds by the regulation; he has nothing to do but to calculate the amount at that rate on the number of pounds shipped. He exercises no judicial or *quasi* judicial function. He concludes nobody's rights, and has no power to do so. The rights which the law gives cannot be defeated by his refusal to act, nor by his decision that no drawback was due.

"Neither the Act of Congress, nor any rule of construction known to us, makes the claimant's right, when the facts on which it depends are clearly established, to turn upon the view which the collector or the Secretary or both combined, may entertain of the law

upon that subject, and much less upon their arbitrary refusal to perform the services which the law imposes on them."

See also:

Morrill v. *Jones*, 106 U. S. 466;
Waite v. *Macy*, 246 U. S. 606, 608.

It is true that Section 502 of the Tariff Act of 1930 (46 Stat. 731, U. S. C., Title 19, Sec. 1502) provides in part:

"(c) *Duties of Customs Officers.*—It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs".

However, that section cannot operate to limit or defeat the plain Congressional intention to subject all decisions of Collectors which affect the rate or amount of duties to protest and subsequent review by the Customs Court. *Tracy* v. *Swartwout*, 10 Pet. 80, 95; *Greely* v. *Thompson*, 10 How. 225, 234.

While, therefore, the instruction of the Secretary to Collectors of Customs, as set forth in Treasury Decision 50134, to use only the "official" buying rate in converting all pounds sterling invoices may be binding upon the Collector, such order enters into the case at bar only as an order or finding "entering into" the decision of the Collector and is fairly comprehended by section 514 of the Act of 1930.

The Collector, acting pursuant to such instruction, liquidated the entry at bar using the wrong rate of exchange, thereby increasing the amount of duties payable on the imported woolens. Clearly, if Section 514 is to be given

any force and effect, protest must lie against such decision of the Collector, including the legality of the order of the Secretary entering into the same.

III

Both "free" and "official" buying rates determined by Federal Reserve Bank under Section 522 (c) are final and conclusive and must be given force and effect.

Section 522 (c) of the Tariff Act of 1930, first enacted as Section 403 of the Emergency Tariff Act of 1921 (42 Stat. 17), introduced a wholly new basis for conversion of foreign currency for tariff purposes, namely, the New York market rate determined by the Federal Reserve Bank.

From 1789 to 1873 the values of foreign coins and currencies for customs computations were established by acts of Congress (See Table 1, Appendix, p. 39). In Section 61 of the Act of March 2, 1799 (1 Stat. 673), a provision was added, empowering the President to make regulations for conversion of currency in cases where the invoice was made out in a depreciated currency. Such regulations provided that a consular certificate should be attached to the invoices stating the value of the currency in standard gold dollars of the United States. Customs Regulations 1874, Article 993 (Appendix, p. 38). A consular certificate of value of a depreciated currency under this regulation and statute was held to be conclusive and binding on all parties. *Cramer* v. *Arthur*, 102 U. S., 612. Said Section 61 of the Act of 1799 was incorporated into the Revised Statutes of the United States with only formal changes as Section 2903 and remained in force until expressly repealed by Section 403 (d) of the Act of May 27, 1921 (42 Stat. 17).

From 1873 until 1894, statutes in force provided that conversion of foreign currency for duty purposes should be

made on the basis of the pure metal value of the foreign coin in circulation in various foreign countries as expressed in United States money (See Table 2, Appendix, p. 39). Such values were required to be estimated by the Director of the Mint and to be proclaimed by the Secretary of the Treasury. The values so determined were held to be final and conclusive and not subject to collateral attack or judicial review. *Cramer* v. *Arthur*, 102 U. S. 612; *Hadden* v. *Merritt*, 115 U. S. 25; *United States* v. *Klingenberg*, 153 U. S. 93.

The foregoing cases did not hold that the Secretary of the Treasury had power to modify, reject, or control in any way the estimate as to the metal value of a foreign currency made by the Director of the Mint. It seems to have been implicit in the statutory system that the determination of the Director of the Mint would be conclusive upon everyone, including the Secretary of the Treasury, and that the Secretary possessed merely the ministerial function of proclaiming the values so determined. In *Staedtler* v. *United States*, 25 C. C. P. A. (Customs), 136, 137, the Court of Customs and Patent Appeals said of this system:

> "the only duty required of the Secretary of the Treasury is the ministerial one of proclaiming the values so 'estimated'."

Section 25 of the Act of August 27, 1894 (28 Stat. 552) re-enacted the provision for determination of pure metal value of foreign coin by the Director of the Mint and proclamation thereof by the Secretary of the Treasury and added a new provision which gave to the Secretary of the Treasury authority to order reliquidation of any entry at a value different from the proclaimed value

> "whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less"

than such proclaimed value. This proviso was recognized as vesting the Secretary of the Treasury with discretionary power. *United States* v. *Whitridge*, 197 U. S. 135, of 1905.

Section 522 (c) of the Tariff Act of 1930 is a re-enactment of Section 522 (c) of the Tariff Act of 1922 (42 Stat. 974), and, as stated, was first enacted as Section 403 of the Act of May 27, 1921 (42 Stat. 17).

Said Section 403 of the Act of 1921 omitted the above quoted proviso to the Act of 1894, expressly repealed Revised Statutes, Section 2903, which authorized the President to regulate conversion of depreciated currencies, and introduced a wholly new method of currency conversion whereby Congress substituted for these previous methods of determining exchange values by the Secretary and the President a determination by the Federal Reserve Bank of New York of buying rates of exchange in the New York market.

The Court of Customs and Patent Appeals gave no consideration to this significant change of policy. Its decision would restore to the Secretary of the Treasury the same discretionary power with respect to foreign exchange rates which the Congress specifically gave to him in the proviso to the Act of 1894 and specifically took away in the Act of 1921.

In Section 522 of the Tariff Act of 1930 Congress has provided—

(1) That the values of foreign coins shall be estimated by the Director of the Mint and be proclaimed by the Secretary of the Treasury;

(2) That for the purpose of assessment and collection of duties, whenever it is necessary to convert foreign exchange into currency of the United States, such conversion shall be made at values *proclaimed by the Secretary*:

(3) If no such value has been proclaimed or if such value varies by more than 5 per centum from the buying rate in the New York market at noon on the day of exportation, conversion *shall be made at a value measured by the buying rate;*

(4) The buying rate is defined to be the buying rate for cable transfers payable in the foreign currency to be converted;

(5) Such buying rate is required to be determined by the Federal Reserve Bank of New York, and in ascertaining such rate the Federal Reserve Bank may in its discretion take into account certain enumerated factors; and

(6) The Federal Reserve Bank is to certify such rate daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary.

Clearly under the statutory scheme Congress intended that in cases where buying rates are applicable, the rate to be used should be that determined by the Federal Reserve Bank. The determination of buying rates requires skill and the exercise of judgment and discretion. The whole subject is confided by the law exclusively to the discretion of the Federal Reserve Bank and unless its determinations are given full force and effect, the entire statutory purpose is defeated. The Federal Reserve Bank is the instrumentality selected by the Congress to determine buying rates, and such buying rates are binding on the Secretary, the Collector, and on importers, just as binding as the specific rates fixed by Congress in the various enactments prior to 1873. If any error in adopting a wrong standard, rule or mode of computation is alleged to have been committed, there is but one method of correction, that is, to appeal to the Bank to modify its determination.

The Secretary of the Treasury, by the instructions to Collectors of Customs to use *only* the "official" rate of ex-

change, has sought to set aside and nullify the "free" rate of exchange for pounds sterling found by the Federal Reserve Bank. The express provisions of existing law clearly give him no such authority, and the prior legislation and decisions of this court lead inevitably to the conclusion that buying rates of exchange, duly determined and certified by the Federal Reserve Bank, must be given force and effect in any case where the currency of an involved invoice and the facts of a particular case require application thereof.

Neither the "free" rate nor the "official" rate may be suppressed or disregarded or set aside. Each of the rates has vitality and force and each is tied up with certain classes or types of merchandise—the "official" rate with whiskey, tin, furs, rubber, and jute, required under British regulations to be paid for in pounds sterling acquired at that fixed rate from the Bank of England or an authorized agent of the Bank of England, and the "free" rate with all other merchandise exported to the United States, including the woolen goods here involved, which were not restricted by British regulations and were paid for by pounds sterling acquired at the free and uncontrolled rate of exchange.

Prior to March 25, 1940, the effective date of the British regulation requiring whiskey, furs, tin, rubber, and jute to be paid for with pounds sterling acquired at the "official" rate, an importer in the United States of *any class of goods* could pay for such goods with pounds sterling bought at the free and uncontrolled buying rate for cable transfers in the New York market. At that time, for purposes of Section 522 (c), a single buying rate was determined and certified daily by the Federal Reserve Bank.

On and after March 25, 1940, when the above mentioned British regulation became effective, the Federal Reserve

Bank for the first time began to certify a second buying rate for pounds sterling, which it denominated "official", meaning the rate fixed by the British Government. The Federal Reserve Bank continued also to certify the single rate it had theretofore certified and denominated such rate "free".

As early as September 3, 1939, the British Government had established an "official" rate of exchange for conversion of pounds sterling and dollars in the United Kingdom. From September 3, 1939 to September 13, 1939 the rate was $4.06 per pound sterling; from September 14, 1939 to January 7, 1940, $4.04 per pound sterling; and from January 8, 1940 to the present time, $4.035 per pound sterling. Stipulation Par. 3 (R. p. 89). The Federal Reserve Bank certified such "official" rate, however, only when that rate became of direct concern in the application of Section 522 (c) through the *use* of pounds sterling obtained at such "official" fixed rate in payment for whiskey, furs, tin, rubber, and jute exported to the United States. Such action was a clear and definite recognition by the Federal Reserve Bank that on and after March 25, 1940, the currency of the invoice of whiskey, furs, tin, rubber, and jute must represent payment in pounds acquired at the fixed "official" rate, and therefore the "official" rate was certified to form the basis for conversion of the currency of the invoice of such products. At the same time the Federal Reserve Bank continued to certify the "free" rate of exchange to form the basis for conversion of the currency of the invoice of all other merchandise imported from the United Kingdom which was purchased with pounds acquired at the "free" rate.

The two rates of exchange had distinct and different applications. The "free" rate could not properly have been used to convert the currency of any invoice of whiskey, furs, tin, rubber, and jute bought with "official" pounds, and the "official" rate could not properly have been used to

convert the currency of any invoice of other merchandise bought with "free" pounds, any more than a certified rate for Mexican dollars could properly have been used to convert an invoice covering merchandise bought with Tientsin dollars.

In this view each rate of exchange is given full force and effect and the requirements of the statute are fully satisfied.

The Court of Customs and Patent Appeals stated that in its opinion Section 522 (c) contemplates the finding of a single buying rate of exchange and that if Section 522 (c) were to be construed to mean that any number of buying rates on the New York market could be certified by the Federal Reserve Bank of New York, the ultimate result would be "confusion worse confounded" (R. p. 127). In the case at bar there were two buying rates determined and certified by the Federal Reserve Bank and there is no evidence whatever of confusion on the part of customs officers regarding their application.

The facts herein establish that the certification and use of both rates was necessary to effectuate the clear purpose of Congress as expressed in Section 522 (c) that the buying rate of exchange to be used in converting a particular foreign currency should be the rate which reflected the purchase of cable transfers payable in the foreign currency to be converted. In the case at bar that rate was the "free" buying rate.

While it is true Section 522 (c) speaks of "the buying rate", it is well settled that when necessary to give effect to the legislative intent, words importing the singular only will be applied to the plural of persons and things. This general rule is stated as follows in U. S. Revised Statutes, Section 1:

> "Sec. 1. In determining the meaning of any Act or resolution of Congress, words importing the singu-

lar number may extend and be applied to several persons or things * * *."

U. S. Revised Statutes, Section 1, U. S. C., Title 1, Section 1.

See also:

United States v. *Oregon & California R. Co.*, 164 U. S. 526, 541; *Muller* v. *Norton*, 132 U. S. 501, 508.

If the Federal Reserve Bank, in the exercise of the discretion granted to it by Section 522 (c), deemed it necessary in order to effectuate the purposes of the enactment to certify two rates for the British pound, such action on its part would seem clearly to come within the provisions of Section 1 of the Code above cited, especially in view of the fact that there is nothing in the statutes appertaining to the subject in question which would appear to limit or negative the right of the Bank to take such action. However, petitioner submits that if this court shall finally determine that the Federal Reserve Bank had authority under the facts of this case to determine and certify but one rate of exchange for pounds sterling, the single rate which must then be given force and effect is the "free" buying rate for the reasons that, first, the so-called "free" rate is the free and uncontrolled rate for cable transfers in the New York market certified by the Federal Reserve Bank under Section 522 (c) prior to March 25, 1940. See Exhibit 6 (R. p. 128, offered R. p. 42). Second, the "official" rate is a rate fixed and controlled by the Government of Great Britain. Its very character seems at variance with the purpose of the Congress in defining a buying rate under Section 522 (c). That statute clearly contemplates a fluctuation in the buying rates based upon free and uncontrolled transactions in the New York market, and hence noon was fixed as the time at which a rate should be determined. That a free and uncontrolled rate was intended by the Congress is further evidenced by the provi-

sion in Section 522 (c) that the Federal Reserve Bank might in its discretion take into consideration the "last ascertainable transactions and quotations" and, if there was no market buying rate, calculate the rate "from actual transactions and quotations in demand or time bills of exchange." No force and effect can be given to these latter statutory directions if a fixed and controlled rate of exchange be adopted under Section 522 (c). *If* the Court of Customs and Patent Appeals is right, therefore, in its decision that only *one rate may be determined and certified* by the Federal Reserve Bank, *then the rate which must be given force and effect is the "free" buying rate of exchange.*

It is petitioner's primary position, however, that the action of the Federal Reserve Bank in determining and certifying both an "official" rate and a "free" rate must be given full force and effect and its judgment as to the existence of the facts calling for that action is not subject to review.

As stated by this court in *United States* v. *Bush & Co.*, 310 U. S. 371, at page 380:

> "It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. [Citing cases.] As stated by Mr. Justice Story in *Martin* v. *Mott*, *supra* (12 Wheat. (U. S.), 31, 32, 6 L. ed. 541): 'Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.'"

Congress has authorized the Federal Reserve Bank to determine buying rates of exchange and to exercise its discretion in the determination thereof. The Federal Re-

serve Bank, in carrying out the policy of Congress as expressed in Section 522 (c), found as a fact that a "free" buying rate and an "official" buying rate for cable transfers payable in pounds sterling, existed in the New York market, and that each of such exchange rates was applicable to distinct classes of commodities in payment for which such cable transfers were to be employed.

Such determination and certification is a conclusive finding by the fact-finding body designated by the Congress that in the case of British currency two separate things exist for the purposes of Section 522 (c), namely, an "official" rate for pounds used for the purchase of whiskey, tin, furs, rubber, and jute, and a "free" rate used for the purchase of all other types of merchandise, including woolens.

The Collector of Customs converted the currency of the instant invoice at a rate of exchange not properly applicable to the imported woolens. The buying rate which should have been used is the rate certified by the Federal Reserve Bank as "free"—the rate of currency or type of currency in which such woolens were purchased and paid for.

IV

The imported woolens were purchased and paid for with pounds sterling convertible at the "free" rate of exchange.

The stipulation filed herein, Par. 10 (R. p. 90) recites that the pounds sterling used in the purchase of the imported woolens were purchased through the Guaranty Trust Company of New York in the New York market for cable transfer on May 22, 1940 at $3.21 and that on that date the Federal Reserve Bank certified to the Secretary of the Treasury a rate for the "free" pound of $3.227187. Said stipulation further states that such pounds sterling were not obtained directly or indirectly from the

Bank of England or an authorized dealer of that bank as defined in the British Finance Regulations, Exhibit 3 [2] herein (R. pp. 106, 109, offered, R. p. 41).

There is, of course, a slight difference in the amounts stipulated to have been paid for the pounds used in the purchase of the imported woolens and the "free" rate certified by the Federal Reserve Bank on the date of such purchase. However, under the statute, the Federal Reserve Bank is required to certify the buying rate in the New York market at noon. Necessarily in the free and uncontrolled market for such pounds, the price paid therefor would vary to some extent in the course of a day. If pounds covered by the Federal Reserve "official" rate were obtainable only at $4.035 and on the day on which the involved pounds were purchased the Federal Reserve Bank certified a "free" rate of $3.22, the fact that the involved pounds were purchased at $3.21 establishes that the currency of the invoice here involved was in pounds sterling which were convertible at the "free" rate.

Additional facts of record establish that the pounds sterling here involved were not obtained from the only two sources from which "official" pounds sterling could be acquired, to wit, the Bank of England or an authorized dealer of that Bank. Such pounds were therefore not "official" and perforce must have been of the type covered by the Federal Reserve certification "free".

The Court of Customs and Patent Appeals did not pass directly on this point. In its opinion, however, that court said that anything in Great Britain could be purchased with pounds sterling converted at the "official" rate and that such was not the case with "free" pounds (R. p. 152). The question whether pounds sterling acquired at the "free" rate could be used for all purposes or whether pounds sterling acquired at the "official" buying rate could be used for all purposes seems to rest wholly in the field of speculation. However, the record demonstrates that the pounds acquired at the "free" rate could

be used in payment for all merchandise exported from the United Kingdom except whiskey, furs, rubber, tin, and jute, and specifically that woolens such as those herein could be purchased with pounds sterling obtained at such "free" rate (R. pp. 74, 77).

If it be argued that the "official" buying rate used by the Collector represents a value established by the Government of Great Britain, the answer is that insofar as all exports to the United States except whiskey, furs, tin, rubber, and jute, are concerned, pounds acquired at the "free" buying rate were recognized and formed the medium of payment between the manufacturer or shipper in the United Kingdom and the importer in the United States. Certainly the fact, if it be a fact, that the "official" buying rate was the only rate fixed *by the United Kingdom in the United Kingdom* can not operate to override and set at naught the "free" buying rate of exchange in the New York market determined by an official agency of the United States Government, to wit, the Federal Reserve Bank, acting under laws of the United States.

The imported woolens were purchased and paid for in pounds sterling convertible at the "free" rate of exchange and the invoice currency should accordingly have been converted at the "free" rate determined and certified by the Federal Reserve Bank for the date of exportation herein, to wit, $3.475138.

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

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Attorney for Petitioner.

J. BRADLEY COLBURN,
SAMUEL M. RICHARDSON,
EUGENE F. BLAUVELT,
of Counsel.

New York, November 27, 1944.

Appendix

Section 522, Tariff Act of 1930

(46 Stat. 739; U. S. C., Title 31, Sec. 372).

Sec. 522. Conversion of Currency.

(a) Value of Foreign Coin Proclaimed by Secretary of Treasury.—Section 25 of the Act of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended, is reenacted without change as follows:

"Sec. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year."

(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value meas-

ured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

— — — —

Section 514, Tariff Act of 1930

(46 Stat. 739, U. S. C., Title 19, Sec. 1514).

SEC. 514. PROTEST AGAINST COLLECTOR'S DECISIONS.

Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or re-

liquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation.

— — — —

Treasury Decision 50134 of April 15, 1940

(Treasury Decisions, Vol. 75, p. 370; 5 Fed. Reg. 1447)

Conversion of currency—Canadian dollars, Newfoundland dollars, English pounds, Australian pounds

Conversion rate for customs purposes of Canadian dollar, Newfoundland dollar, English pound and Australian pound

Treasury Department, April 15, 1940.

To Collectors of Customs and Others Concerned:

Reference is made to the daily buying rates for foreign exchange which section 522(c) of the Tariff Act of 1930 (U. S. C. title 31, sec. 372(c)) directs the Federal Reserve

Bank of New York to certify to the Secretary of the Treasury. The list of rates certified by the Federal Reserve Bank of New York has included two rates for the Canadian dollar and the Newfoundland dollar since March 22, 1940, two rates for the English pound since March 25, 1940, and two rates for the Australian pound since April 1, 1940. In each case the higher rate has been designated "Official", the other "free".

Whenever it is necessary to convert any of the above-mentioned currencies into currency of the United States for the purpose of the assessment and collection of duties upon imported merchandise, customs officers shall make such conversions on the basis of the rate designated "official," unless the rate proclaimed for the respective currency pursuant to section 522(a) of the Tariff Act of 1930 (U. S. C. title 31, sec. 372 (a)) varies from such "official" rate by less than 5 per centum. In the latter event the proclaimed rate should be used.

Until further notice only the "official" rates for the named currencies will appear in the weekly issues and bound volumes of the Treasury Decisions. The pertinent facts and circumstances will be kept under review and, should future developments make it advisable, further instructions will be given.

H. Morgenthau, Jr.,
Secretary of the Treasury.

Treasury Decision 50146 of May 11, 1940

(Treasury Decisions, Vol. 75, p. 388)

Foreign currencies—Rates of exchange

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York.

Appendix.

Treasury Department,
Office of the Commissioner of Customs,
Washington, D. C., May 11, 1940.

To Collectors of Customs and Others Concerned:

The appended table of the values of certain foreign currencies as certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under the provisions of section 522 (c), Tariff Act of 1930, during the period from May 3 to 9, 1940, inclusive, is published for the information of collectors of customs and others concerned.

By direction of the Commissioner:

W. R. Johnson,
Deputy Commissioner of Customs.

Values of foreign currencies certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under provisions of section 522 (c), Tariff Act of 1930:

Period May 3 to 9, 1940, Inclusive

Country	Name of currency	May 3
		Dollars
Europe:		
England	Pound sterling	[4] 4.035000

[4] (Official or Controlled.) * * * The rates for Canadian dollars, Newfoundland dollars, English pounds, and Australian pounds included in this list are for use pursuant to the directions in T. D. 50134.

Section 61, Act of March 2, 1799

(1 Stat. 673)

* * * *Provided*, that it shall be lawful for the President of the United States, to cause to be established fit and proper regulations for estimating the duties on goods, wares and merchandise imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government.

Customs Regulations 1874, Article 993

ARTICLE 993. The invoice values of foreign merchandise imported into the United States shall hereafter be reduced to the money of account of the United States, that is to say, the standard gold dollars of 25-8/10 grains troy, total weight, and nine tenths, or 23-22/100 grains troy weight, of pure gold, in accordance with the rates of value, determined as required by law, and in the following manner:

First. Where the standard value of a foreign currency has been proclaimed by the Secretary of the Treasury, in the manner provided by law, that value is to be taken in all cases in estimating customs duties, unless collectors have been otherwise instructed, or unless a depreciation of the value of the foreign currency expressed in an invoice, from the standard of that currency, shall be shown by consular certificate thereunto attached.

Secondly. Where the standard value of a foreign currency has not been proclaimed by the Secretary of the Treasury, in the manner provided by law, an invoice expressed in such currency must be accompanied by a consular certificate, showing its value in standard gold dollars of the United States.

Appendix.

Table 1

Statutes Establishing Values or Revising or Repealing Values 1789 to 1873

Act of July 31, 1789, Sec. 18, 1 Stat. 41;

Act of September 29, 1789, Sec. 3, 1 Stat. 95;

Act of August 4, 1790, Sec. 40, 1 Stat. 167;

Act of August 4, 1790, Paragraph 2 of Sec. 74 and Sec. 75, 1 Stat. 178;

Act of March 3, 1791, 1 Stat. 215;

Act of May 2, 1792, Sec. 17, 1 Stat. 262;

Act of March 2, 1799, Sec. 61, 1 Stat. 673;

Act of March 3, 1801, Secs. 1 and 2, 2 Stat. 121;

Act of July 27, 1842, Secs. 1 and 2, 5 Stat. 496;

Act of March 3, 1843, 5 Stat. 625;

Act of March 3, 1845, 5 Stat. 740;

Act of May 22, 1846, 9 Stat. 14;

Act of March 2, 1861, 12 Stat. 207.

Table 2

Statutes in Force 1873 to 1894 Inclusive

Act of March 3, 1873, 17 Stat. 602;

U. S. Revised Statutes, Secs. 3564, 3565;

Act of Oct. 1, 1890, Sec. 52, 26 Stat. 524;

Act of Aug. 27, 1894, Sec. 25, 28 Stat. 552.

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No. 287

In the Supreme Court of the United States

OCTOBER TERM, 1948

JOHN BARR, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Customs Court (R. 112–118) is reported in 79 Treasury Decisions Advance Sheets, August 12, 1943, p. 14. The opinion of the Court of Customs and Patent Appeals (R. 120–128) is reported in 79 Treasury Decisions Advance Sheets, July 6, 1944, p. 28.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on May 22, 1944 (R. 128). The petition for a writ of certiorari was filed on July 26, 1944. The jurisdiction of this

Court is invoked under Section 195 of the Judicial Code, as amended (28 U. S. C. 308).

QUESTION PRESENTED

On March 25, 1940, and thereafter, including May 3, 1940, the Federal Reserve Bank of New York, purporting to act under Section 522 (c) of the Tariff Act of 1930, certified daily to the Secretary of the Treasury two buying rates for converting English pounds sterling into United States dollars, one designated as the "free" rate, the other, which was somewhat higher, designated as the "official" rate. The Secretary of the Treasury directed the various collectors of customs to use the "official" rate in converting pounds into dollars for customs duty purposes when the "official" rate varied by more than five per centum from the rate proclaimed by the Secretary under Section 522 (b) of the Tariff Act of 1930. The question presented is:

> Whether the action of the Secretary of the Treasury in directing the collectors of customs to use only the "official" rate was within his authority and not subject to judicial review.

STATUTE INVOLVED

Section 522 of the Tariff Act of 1930 (46 Stat. 590, 739–740, 19 U. S. C. 1522) provides:

> (a) VALUE OF FOREIGN COIN PROCLAIMED BY SECRETARY OF TREASURY.—Section 25 of

the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended, is reenacted without change as follows:

"SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year."

(b) PROCLAIMED VALUE BASIS OF CONVERSION.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the date of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) MARKET RATE WHEN NO PROCLAMATION.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a

value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

STATEMENT

Coincident with the outbreak of the present war between Great Britain and Germany, the British Government inaugurated an elaborate system for controlling foreign exchange through a series of orders and regulations which, among other things, required all persons resident in the

United Kingdom to sell to the British Treasury at prices fixed by it all foreign currency which they were entitled to sell, and prohibited, with a few exceptions, the exportation of foreign currency from the United Kingdom, and the purchase and sale of foreign currency in the United Kingdom from or to any person other than an authorized dealer in such currency, at prices to be fixed by the British Treasury (R. 74–75, 78–100). On March 7, 1940, an order, effective March 25, 1940, was issued by the British Government wherein it was provided that certain classes of merchandise (not including woolen cloth) might be exported from the United Kingdom to the United States and several other countries, only when payment therefor had been made to persons resident in the United Kingdom in the currency of the respective countries, or in English pounds purchased in the United Kingdom after September 3, 1939, from an authorized dealer in foreign currency[1] (R. 75, 100–102).

Under date of March 19, 1940, the Federal Reserve Bank of New York notified the Secretary of the Treasury that, beginning March 25, 1940, and because of the British order of March 7, 1940, it would certify to the Secretary of the Treasury pursuant to Section 522 (c) of the Tariff Act

[1] Subsequent to the exportation of the merchandise involved in the case at bar, this order was amended, effective June 10, 1944, to include merchandise of any class or description (R. 104).

of 1930, *supra*, pp. 3–4, two rates for the English pound sterling, one to be designated as the "free" rate, and the other as the "official" rate, the latter being the rate fixed by the British Treasury (R. 76, 107–108). On April 15, 1940, the Secretary of the Treasury directed the collectors of customs (T. D. 50134, 75 Treasury Decisions, 370–371; 5 Fed. Reg. 1447) to use the "official" rate for the purpose of assessing and collecting duties on imported merchandise when that rate varied by more than five per centum from the rate proclaimed by the Secretary under Section 522 (b) of the Tariff Act of 1930, *supra*, p. 3 (R. 122–123). Thereafter, on May 3, 1940, the petitioner caused to be exported from Scotland certain woolen cloth (R. 11, 31), which was imported into the United States at the port of New York on May 13, 1940 (R. 5–6). Payment for the merchandise was made with pounds purchased through the Guaranty Trust Company of New York in the New York market for cable transfer on May 22, 1940, at $3.21 (R. 76–77). On the date the merchandise was exported from Scotland, the Federal Revenue Bank of New York certified to the Secretary of the Treasury that on that day the "free" rate for the English pound was $3.475138, and the "official" rate $4.035000 (R. 109). The Secretary of the Treasury, in conformity with his directions of April 15, 1940, to the collectors of customs, published

only the "official" rate (T. D. 50146, 75 Treasury Decisions 389) (R. 123). The woolen cloth was invoiced, entered, and appraised in English pounds, and since the "official" rate on the date of exportation varied by more than five per centum from the proclaimed rate for the quarter in which the goods were exported (R. 76), the collector of customs, as directed by the Secretary, used the "official" rate instead of the proclaimed rate in converting the English pounds into United States dollars for the purpose of assessing and collecting duties thereon (R. 6).

The petitioner filed a protest against the manner in which the collector of customs liquidated the entry (R. 5–6), and at the trial of the case counsel for the petitioner contended that the action of the Secretary of the Treasury in directing the collector of customs to use the "official" rate only was beyond the Secretary's legal authority; that the "free" rate was the only rate which could be legally used in converting English pounds into United States dollars in connection with the merchandise involved in the case at bar; and that the failure of the collector to use the "free" rate rendered illegal his assessment and collection of duties on the merchandise in excess of the amount which the use of the "free" rate would have required[2] (R. 32–33).

[2] There is no controversy concerning the value of the woolen cloth in English pounds or the tariff classification under which the cloth should fall (R. 10, 31).

ARGUMENT

The court below followed the rule that orders and proclamations issued by the Secretary of the Treasury governing the rates to be used in converting foreign currencies into United States dollars for customs duty purposes are not subject to judicial review if on their face they conform to the statute involved. This rule, which was established long ago by this Court, has been reiterated from time to time. *Cramer* v. *Arthur*, 102 U. S. 612; *Hadden* v. *Merritt*, 115 U. S. 25; *United States* v. *Klingenberg*, 153 U. S. 93; *United States* v. *Whitridge*, 197 U. S. 135.

The United States Customs Court sustained the protest (R. 118–119), holding that the Federal Reserve Bank had authority under Section 522 (c) of the Tariff Act of 1930, *supra*, pp. 3–4, to certify two rates for a single currency; that the action of the Secretary in directing the collector to use only the "official" rate was beyond the scope of his powers; and that it was the duty of the collector to use the "free" rate for the reason that merchandise of the kind involved in the case at bar did not fall within the terms of the British order in effect on the day of exportation, which required that payments for certain exports be made in United States dollars, or in pounds sterling purchased in the United Kingdom from an authorized dealer at the "official" rate of exchange (R. 112–118).

The Court of Customs and Patent Appeals reversed the judgment of the Customs Court on the grounds that Section 522 (c) of the Tariff Act of 1930, *supra*, pp. 3–4, contemplates the finding of a single buying rate of exchange; that the "official" rate was the all-inclusive buying rate for pounds; that the direction given by the Secretary to the collector to use the "official" rate, on its face, conformed to the law; and that, under the established rule, the correctness of the Secretary's direction to the collector was accordingly not subject to judicial inquiry (R. 120–129). The reasons which necessitated the adoption of the rule were stated by this Court to be the prevention of "utter confusion and uncertainty" in connection with the assessment of duties on imported merchandise. *Cramer* v. *Arthur*, 102 U. S. 612, 619.

Petitioner asserts, in effect, that the above-mentioned rule is not applicable to this case, and contends that Section 522 (c), *supra*, pp. 3–4, contemplates the finding and certification by the Federal Reserve Bank of a plurality of buying rates for a single currency; that it was the duty of the Secretary of the Treasury to publish both of the rates certified by the Bank; and that it was incumbent upon the collector of customs, subject to judicial review, to select and use the rate properly applicable to the particular case (Pet. 6–9).

Under the holding of the court below, the above-mentioned rule is applicable to the case at bar because Congress, when enacting Section 522 (c)

did not contemplate, as the terms of that Section disclose, the finding of more than one buying rate for a single currency, and did not, therefore, intend to change the legislative policy, which has existed throughout the greater part of the life of the nation, that rates of exchange established by findings and proclamation of executive officers should be final and binding on importers and collectors of customs, and should not be subject to judicial review, except to inquire whether the action of the executive officer on its face conformed to the statute involved. This construction of the Section is reasonable. There is no language in the Section to indicate that Congress intended that more than one buying rate for a single currency should be used for customs duty purposes or that questions concerning rates of exchange, which had been withheld from litigation throughout the life of the nation, should be thrown into the courts, and we have found nothing in the legislative history of the Section from the time it first appeared in the law as Section 403 (c) of the Emergency Tariff Act of 1921 (42 Stat. 9, 17), to suggest that the Congress had such innovations in mind.

The comparable provision of law which was in effect immediately prior to the enactment of the original version of Section 522 (c), *supra*, pp. 3–4, as Section 403 (c) of the Emergency Tariff Act of 1921, was found in the proviso to Section 25 of the

Act of August 27, 1894, 28 Stat. 552, and read as follows:

> *Provided,* That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred.

The purpose of the change in the law is clear. Violent fluctuations in the value of foreign currencies following the first World War rendered inadequate the cumbersome method of handling depreciated foreign currency conversion through the reliquidation of entries ordered by the Secretary of the Treasury. Something more expeditious was necessary. A regular daily publication by the Secretary of the value of each foreign currency would permit the handling of currency conversion in connection with customs matters with the desired celerity and dispatch, and it was considered that the Federal Reserve Bank of New York was more favorably situated than the Secretary of the Treasury for obtaining the necessary information concerning daily currency values without delay. Thus, the paramount purpose of the change in the law was to eliminate, so far as possible, inade-

quacies and delays in the administration of the customs laws caused by a rapidly changing money market. Manifestly, this purpose is inconsistent with an intention to confuse and retard customs procedure by permitting plural rates of exchange for a single currency. It is likewise inconsistent with an intention to expand judicial procedure in customs cases by permitting importers to litigate questions which theretofore they had not been given the privilege of litigating.

A consideration of the results which might flow from the adoption of the construction contended for by petitioner sharply emphasizes the soundness of the construction placed on Section 522 (*c*) by the court below. For example, a construction which would permit the finding of a plurality of rates of exchange for a single currency might produce results seriously inimical to proper administration of the customs laws. If the statute permits the finding of two rates, obviously it permits the finding of any other number of rates for a single currency of any foreign country. Under the circumstances, "confusion and uncertainty" (*Cramer* v. *Arthur*, 102 U. S. 612, 619) would be inevitable, as the court below recognized (R. 127). In fact, any foreign country could control, to a large extent, the amount of duties to be paid on its exports to the United States by fixing the rates of exchange at which, and providing the conditions under which, its currency could be purchased for the purpose

of paying for such exports. Conceivably, situations could exist where a different rate might be found for every principal class of merchandise. Thus, collectors of customs would be faced not only with the burdensome task of obtaining evidence on rates of exchange from foreign countries in thousands of cases before they could attempt to liquidate entries of imported merchandise, but they would be required in many instances to interpret and construe foreign laws and orders in order to determine under what classification any given article of merchandise would fall for rate of exchange purposes. We believe that a construction which would permit findings of plural rates of exchange is incorrect, and should not be placed upon legislation which bears no express word or implication that Congress intended to expand the judicial procedure in connection with the litigation of customs claims against the United States or to revise completely the fundamental and long-existing process for administering the conversion of foreign currency for customs duty purposes.

The holding of the court below which sustained the action of the Secretary of the Treasury in selecting and publishing the "official" rate, is valid. The very phraseology of Section 522 (c), *supra*, pp. 3–4, reveals that one buying rate is envisaged. Since it is obvious that the market is ordinarily for unrestricted currency, it is only logical to conclude that "the buying rate" refers

to the buying rate for such currency. As stated by the court below, the "official" rate was the all-inclusive buying rate (R. 127), for it was the sole buying rate at which English pounds could be purchased either in New York or Great Britain for all purposes and with no restrictions upon their use. It follows that the "official" rate was "the buying rate" contemplated by Section 522 (c). Because the Federal Reserve Bank certified one buying rate which conformed to the statute, and one which did not conform to the statute, the action of the Secretary in selecting the rate which conformed to the statute was not arbitrary, and for the same reason his action did not encroach upon the power delegated by Congress to the Federal Reserve Bank.

CONCLUSION

The decision of the court below is correct, and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 287

JOHN BARR, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States Customs Court (R. 134–142) is reported in 79 Treasury Decisions Advance Sheets, August 12, 1943, p. 14. The opinion of the Court of Customs and Patent Appeals (R. 145–153) is reported at 143 F. (2d) 132.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on May 22, 1944 (R. 153). The petition for a writ of certiorari was filed on July 26, 1944, and was granted on October 9, 1944. The jurisdiction of this Court is invoked

under Section 195 of the Judicial Code, as amended (28 U. S. C. Sec. 308).

QUESTION PRESENTED

On March 25, 1940, and thereafter, including May 3, 1940, the Federal Reserve Bank of New York, purporting to act under Section 522 (c) of the Tariff Act of 1930, certified daily to the Secretary of the Treasury two buying rates for converting English pounds sterling into United States dollars, one designated as the "free" rate, the other, which was somewhat higher, designated as the "official" rate. The Secretary of the Treasury directed the various collectors of customs to use the "official" rate in converting pounds into dollars for customs duty purposes when the "official" rate varied by more than five per centum from the rate proclaimed by the Secretary under Section 522 (b) of the Tariff Act of 1930. The question presented is:

> Whether the action of the Secretary of the Treasury in directing the collectors of customs to use only the "official" rate was within his authority and not subject to judicial review.

STATUTES INVOLVED

Section 522 of the Tariff Act of 1930, 46 Stat. 739, 31 U. S. C. Sec. 372, reads as follows:

> SEC. 522. CONVERSION OF CURRENCY.
>
> (a) *Value of foreign coin proclaimed by Secretary of Treasury.*—Section 25 of the

Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended, is reenacted without change as follows:

"SEC. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year."

(b) *Proclaimed value basis of conversion.*—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

(c) *Market Rate When no Proclamation.*—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured

by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange.

The other statutes involved are set forth in Appendix A, *infra*, pp. 43–46, and in the text of the Argument, *infra*, pp. 31–33.

STATEMENT

Coincident with the outbreak of the present war between Great Britain and Germany, the British Government inaugurated an elaborate system for controlling foreign exchange through a series of

orders and regulations which, among other things, required all persons resident in the United Kingdom to sell to the British Treasury at prices fixed by it all foreign currency which they were entitled to sell, and prohibited, with a few exceptions, the exportation of foreign currency from the United Kingdom and the purchase and sale of foreign currency in the United Kingdom from or to any person other than an authorized dealer in such currency, at prices to be fixed by the British Treasury (R. 88–89, 92–120). On March 7, 1940, an Order in Council, effective March 25, 1940, was issued by the British Government wherein it was provided that certain classes of merchandise (not including woolen cloth) might not be exported from the United Kingdom to the United States and several other countries except when payment therefor had been or would be made to persons resident in the United Kingdom in specified currencies, including United States dollars, or in English pounds purchased in the United Kingdom after September 3, 1939, from an authorized dealer in foreign currency[1] (R. 89, 120–123). Authorized dealers sold English pounds only at the rate of $4.035, prescribed by the British Treasury, from January 8, 1940 to the time of the trial of this case (R. 89).

[1] Subsequent to the exportation of the merchandise involved in the case at bar, this Order was amended, effective June 10, 1944, to include merchandise of any class or description (R. 125–126).

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Under date of March 19, 1940, the Federal Reserve Bank of New York notified the Secretary of the Treasury by letter (*infra*, pp. 47–48) that, beginning March 25, 1940, and because of the British order of March 7, 1940, it would certify to the Secretary of the Treasury pursuant to Section 522 (c) of the Tariff Act of 1930, *supra*, pp. 2–4, two rates for the English pound sterling, one to be designated as the "free" rate, and the other as the "official" rate, the latter being the rate fixed by the British Treasury (R. 90, 128–130). On April 15, 1940, the Secretary of the Treasury notified the collectors of customs (T. D. 50134, 75 Treas. Dec. 370–371, 5 Fed. Reg. 1447, *infra*, pp. 49–50) that until further notice he would publish only the "official" rate and directed them to use that rate for the purpose of assessing and collecting duties on imported merchandise whenever it varied by more than five per centum from the value of the gold pound proclaimed by the Secretary under Section 522, (a) of the Tariff Act of 1930, *supra*, p. 3. The value of the gold pound at all pertinent times was determined by proclamation to be $8.2397 (R. 90).

On May 3, 1940, there were exported to the petitioner from England certain woolen fabrics (R. 88), which were imported into the United States at the port of New York on May 13, 1940, where the merchandise was appraised and the duties were ascertained and liquidated. (R. 6–7.)

Payment for the merchandise was made with pounds purchased through the Guaranty Trust Company of New York in the New York market for cable transfer on May 22, 1940, at $3.21 (R. 90). On the date the merchandise was exported from England, the Federal Reserve Bank of New York certified to the Secretary of the Treasury that at noon on that day the "free" rate for the English pound was $3.475138 and the "official" rate was $4.035000 (R. 130–131; *infra*, p. 49). The Secretary, pursuant to his notification of April 15, 1940, to the collectors of customs, published only the "official" rate (T. D. 50146, 75 Treas. Dec. 388, *infra*, pp. 50–51). Since the "official" rate varied by more than five per centum from the proclaimed value of the gold pound for the quarter in which the goods were exported, the collector of customs, as directed by the Secretary, used the "official" rate in converting pounds into dollars for the purpose of assessing and collecting duties upon the value of the woolens. (R. 7.)

The petitioner filed a protest under the provisions of Section 514 of the Tariff Act of 1930, *infra*, p. 44, against the collector's ascertainment and liquidation of the duties (R. 6–7). The protest does not specify the respect in which the collector failed to apply "the buying rate in the New York market at noon on the day of exportation," as it is alleged "should" have been

done, but the protest was sustained as sufficient by the Customs Court (R. 33) after the Government had moved to dismiss (R. 9–10, 11, 23). The Court of Customs and Patent Appeals sustained the sufficiency of the protest under the "liberal construction placed upon protests" under its practice (R. 151). At the trial counsel for the petitioner contended that the collector committed error in converting pounds to dollars at the "official" rate and that he should have used the "free" rate certified by the Federal Reserve Bank for the date in question (R. 38).[2]

The United States Customs Court sustained the protest (R. 143), holding that the Federal Reserve Bank had authority under Section 522 (c) of the Tariff Act to certify both the "official" and the "free" rates; that the action of the Secretary in directing the collectors to use only the "official" rate was beyond the scope of his powers; and that it was the duty of the collector to use the "free" rate for the merchandise involved in the case at bar. (R. 134–142.)

The Court of Customs and Patent Appeals reversed the judgment of the Customs Court (R. 153) because (1) the Secretary's direction to use the "official" rate was binding upon the collector and, since on its face it was valid, was conclusive

[2] There is no controversy concerning the value of the woolen cloth in English pounds or the tariff classification under which the cloth should fall (R. 11, 36).

upon the court as well; and (2) Section 522 (c) contemplates a single buying rate upon a currency, which, in the case of the pound, was the "official" rate since that was "all inclusive." (R. 145–153.)

SUMMARY OF ARGUMENT

I

The court below properly held that Section 522 (c) of the Tariff Act contemplates the finding of only a single buying rate of exchange for use in customs administration. The language of the statute lends no support to the view that more than one rate was contemplated. Petitioner's contention to the contrary, based largely upon the doctrine that the singular may import the plural, ignores the limitation that this principle applies only where it is necessary to carry out the intent of the statute. The purpose of Congress to provide for a single rate of exchange upon each foreign currency in order to facilitate customs administration is evident from the legislative history of Section 522 (c). To hold otherwise would introduce great complexity into customs administration growing out of multiple exchange rates which frequently come into existence with reference to controlled currencies.

II

The British official rate was lawfully certified by the Federal Reserve Bank of New York and lawfully used, pursuant to the instruction issued by

the Secretary of the Treasury, in ascertaining the duties in this case. The official rate was the only rate at which English pounds could be purchased for use for all purposes, including payment for exported goods of all kinds, and consequently was the only single rate that could be employed. The fact that the Bank's certification of this rate was accompanied by the certification of the so-called "free" rate, which the Secretary of the Treasury properly disregarded, did not invalidate the certification of the correct rate. Section 522 (c) does not require that the rate certified be wholly the result of bargaining under all circumstances. A rate employed in actual purchases of exchange in New York City may be certified, even though it results from an official decree. The "free" rate did not evidence the value of the pound, but in reality affected only the price of goods purchased with "free" pounds. The "free" and the "official" rate were not each "tied up with certain classes * * * of merchandise", as contended by petitioner. In point of fact it has not been established that pounds purchased at the "free" rate were used in payment for merchandise to the full extent which was legally possible under the British Order in Council. Even if this were true, it would not follow that the free rate should be used for customs purposes, since the statute requires that duties be assessed upon the value of the goods and not upon their price.

III

In any event, the designation of the "official" rate by the Secretary of the Treasury as the rate to be used was valid and may not be set aside by a court. Two rates in fact existed, as the Federal Reserve Bank certified. This certification confronted the Secretary with a condition in which no statutory buying rate had as yet been determined. He acted properly and within his powers in determining that the "official" rate should be the only one used for customs purposes. His authority stems both from Section 522 (c), which empowers him to publish the rates certified "at such times and to such extent as he deems necessary", and from several sections of the Tariff Act of 1930 and of the Revised Statutes, which authorize him to issue regulations and instructions for the collection of customs and render his instructions binding upon collectors.

Judicial review of the legality of the Secretary's instruction is provided in Section 514 of the Tariff Act; but the scope of this review depends upon the nature and scope of the authority conferred upon the Secretary. The power which he exercised in this case is the general supervisory power of the head of a department with respect to the functions of that department, coupled with the specific discretionary duty of publishing rates of exchange. The decisions of this Court establish that this administrative supervisory power may be exer-

cised to the fullest extent without judicial interference and that a regulation adopted pursuant to it "should not be disregarded or annulled unless * * * it is plainly and palpably inconsistent with law."

Section 522 (c) of the Tariff Act does not limit the authority of the Secretary by subjecting his discretion to that of the Federal Reserve Bank. The Bank is vested with discretion in the sense of skill and judgment in arriving at a technical determination of fact, but the determination of the use to be made of rates of foreign exchange rests with the Secretary. The whole history of rates of exchange in relation to customs administration, and the decisions of this Court with reference to the Secretary's determinations in this field, bear out this view. No decision has ever overturned or gone behind a proclamation of the value of foreign coin or a consular certification of the value of currency under earlier legislation. Without necessarily contending that a court may not look behind the Secretary's proclamation or instruction for evidence of illegality, we think it is clear that nothing whatever entered into the Secretary's determination in this case which attaches the slightest taint of illegality to it. For the Court here "to probe the reasoning which underlies" his action "would amount to a clear invasion of the legislative and executive domains." *United States* v. *Bush & Co.*, 310 U. S. 371, 380.

ARGUMENT

I. THE CERTIFICATION BY THE FEDERAL RESERVE BANK OF NEW YORK OF MORE THAN ONE BUYING RATE FOR A SINGLE CURRENCY IS NOT CONTEMPLATED IN SECTION 522 (c) OF THE TARIFF ACT OF 1930

The court below held (R. 152) that "section 522 (c) * * * contemplates the finding of a single buying rate of exchange. This we think is obvious from a reading of the section."

The foregoing conclusion is clearly correct. The paragraph in question comes into operation if the proclaimed value of a foreign coin "varies by 5 per centum or more from *a value* measured by *the buying rate* in the New York market * * *. For the purposes of this subdivision such buying rate shall be *the buying rate* for cable transfers payable in the foreign currency so to be converted." [Italics supplied.] The language of the statute lends no support to the view that more than one rate was contemplated and that collectors of customs might at various times use both the "official" and the "free" rates for customs purposes.

Petitioner's contention to the contrary (Br. 27–28) is not based upon any considerations relating to the Tariff Act or customs administration but rests largely upon the provision of Section 1 of the Revised Statutes, 1 U. S. C. Sec. 1, that "words importing the singular number may extend and be applied to several persons or things." As

this Court has held, however, "obviously this rule is not one to be applied except where it is necessary to carry out the evident intent of the statute." *First National Bank* v. *Missouri*, 263 U. S. 640, 657. The rule is designed to avoid defeating the legislative purpose because of faulty drafting or literal interpretation, and not to add to the intended meaning of words. In the *First National Bank* case the Court found "nothing in the context or subject matter to require the construction contended for." *Ibid.* Such is also the situation here; indeed, the legislative history of Section 522 (c) points directly to the conclusion that one of the primary purposes of Congress in enacting it was to bring about simplicity and clarity of administration by providing for a single rate of exchange each day upon each foreign currency for tariff act purposes. To hold that more than one rate may be certified and must be considered by the collectors in assessing duties upon numerous importations would defeat this objective.

The language of Section 522 (c) first appeared in the law as Section 403 (c) of the Emergency Tariff Act of 1921, 42 Stat. 9, 17. That Act repealed the previous provisions for determining the value of foreign currency for customs purposes, to be used when the value departed significantly from the value of the corresponding foreign coin. Those provisions were two in number. Section 61

of the Act of March 2, 1799, 1 Stat. 673 (R. S. Sec. 2903) empowered the President to make regulations for the conversion of currency in any case in which the invoice was made out in a depreciated currency. The regulations promulgated to carry out this provision directed that the value of the depreciated currency be determined from a consular certificate. *Customs Regulations* 1874, Article 993. Section 25 of the Act of August 27, 1894, 28 Stat. 552, after continuing previous provisions for determining and proclaiming the value of foreign coin,[3] made the following additional provision relating to depreciated currencies:

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[3] From 1789 to 1873 the values of foreign coins for customs duty purposes were specifically fixed by the Congress. Act of July 31, 1789, Sec. 18, 1 Stat. 41; Act of September 29, 1789, Sec. 3, 1 Stat. 95; Act of August 4, 1790, Sec. 40, 1 Stat. 167; Act of August 4, 1790, Paragraph 2 of Sec. 74 and Sec. 75, 1 Stat. 178; Act of March 3, 1791, 1 Stat. 215; Act of May 2, 1792, Sec. 17, 1 Stat. 262; Act of March 2, 1799, Sec. 61, 1 Stat. 673; Act of March 3, 1801, Secs. 1 and 2, 2 Stat. 121; Act of July 27, 1842, Secs. 1 and 2, 5 Stat. 496; Act of March 3, 1843, 5 Stat. 625; Act of March 3, 1845, 5 Stat. 740; Act of May 22, 1846, 9 Stat. 14; Act of March 2, 1861, 12 Stat. 207. Since 1873 the statutes have provided, subject to the provision made for depreciated currencies, that the value of foreign money for customs duty purposes shall be the pure metal value of foreign coin in United States money as estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury. Act of March 3, 1873, 17 Stat. 602, R. S. Secs. 3564, 3565; Act of Oct. 1, 1890, Sec. 52, 26 Stat. 624; Act of Aug. 27, 1894, Sec. 25, *supra*, now incorporated in Sec. 522 (a) Tariff Act of 1930, *supra*, pp. 2–3.

> *Provided*, That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred.

The procedure required under the provision of 1894, like that under the Act of 1799, depended upon a consular certificate to establish the percentage of depreciation of the currency specified in an invoice as compared with the corresponding standard coin. T. D. No. 23725, 5 Treas. Dec. 396; Consular Regulations (1896), with amendments to 1919, par. 692 as amended May 28, 1914. Reliquidation followed if more than ten percent depreciation was shown. *Customs Regulations* 1915, Art. 621. There was, consequently, no single source, and there was none at all within the United States, to which customs officials could look to determine the value of a depreciated currency. They were required, instead, to look to information obtained from all parts of the globe.

It was to correct this situation and to deal with currency depreciation following the First World War that Section 403 (e) was included in the Emergency Tariff Act of 1921. That provision was inserted by the Senate Finance Committee.

In explanation of its action the Committee reported as follows:

> Under the existing law and executive orders in the case of imported merchandise the United States consuls in the various foreign countries have to certify the value of the currency in which the invoice is made out as of the date of certification. In many cases the consuls fail to make the certification and in such cases it becomes necessary for the importer to pay duty on the gold basis and to ascertain the correct value of the currency, which can only be readjusted in a final reliquidation and is dependent upon the obtaining of a consular certificate.
>
> This frequently results in the assessment of excessive import duties and necessitates a great amount of unnecessary labor on the part of the importer and the Treasury officials in making the proper adjustments in order to refund the excess duties so collected. The present system requires the ascertainment of the value of foreign currency values thousands of miles away from the port of entry. The proposed amendment would permit the ascertainment of the value of foreign currency in the United States, at which point it is readily ascertainable with a greater degree of accuracy. It provides that in cases in which the foreign currency varies by 5 per cent or more from the value measured by the buying rate in the New York market at noon on the

> day of exportation, the conversion shall be made at a value measured by such buying rate. The Federal reserve bank of New York is authorized to determine the buying rate and the proposed amendment provides that the buying rate shall be the buying rate for cable transfers payable in the foreign currency to be converted. The section requires the Federal reserve bank of New York to certify the exchange rates to the Secretary of the Treasury daily and requires the Secretary to make such rates public for the use of the collectors and appraising officers in assessing duties. [S. Rep. 16, 67th Cong., 1st sess., p. 16. The same language was included in the conference report. H. Rep. 79, 67th Cong., 1st sess., p. 12.]

It is clear from the foregoing that the purpose of adopting the present procedure for determining the value of a foreign currency, to be used when that varies to a substantial degree from the value of the corresponding coin, was to provide a simplified, accurate method of making the necessary determination, by substituting as the measure a single rate in a specified market, as ascertained by a competent agent, for the scattered reports previously relied upon. It would run counter to this purpose to a greater extent than appears upon the surface to hold that the singular imports the plural in Section 522 (c) and that it was contemplated that more than one buying

rate would be certified at a time for a single currency for use in customs administration.

The certification here involved, for May 3, 1940, contained two rates for the Canadian and Newfoundland dollars, the Australian pound, the Brazilian milreis, and the Colombian and Uraguayan pesos. (R. 130–131.) Currency controls may produce great complexity in exchange rates.[4] At present, for example, there are four rates in effect for the Argentinian and Chilean pesos and three for the Brazilian cruzeiro. In Argentina, in addition, special rates apply to certain imports from the United States. *Foreign Commerce Weekly* (U. S. Dept. of Commerce), Nov. 18, 1944, p. 33. If, as in the case of the British pound on May 3, 1940, foreign decrees render certain quotations inapplicable to the purchase of exchange in payment for certain classes of exports from the issuing countries, it would be necessary, if all these quotations were recognized, for appraisers in comparing "foreign" and "export" values to determine which is applicable to each value of a given importation (Tariff Act, Sec.

[4] Exchange control "does not represent a uniform system, but one of almost unlimited variety both in its application and in its purposes." League of Nations, *Report on Exchange Control*, p. 23 (1938, Report II. A. 10). This Report of a committee composed of members of the Economic and Financial Committees of the League is an excellent brief factual summary and critique of exchange controls as they developed during the '30's. See also Einzig, *Exchange Control* (London, 1934).

402, *infra*, p. 43), and for collectors of customs in assessing duties[5] to determine which rates apply to particular imports, with all of the classification difficulties that this would involve. The source of the criteria to be employed in resolving these problems would, moreover, necessarily be the foreign countries in which the restrictive decrees originated. Hence the purpose of the statute in providing for a single source within the United States for rates of exchange for customs purposes would be altogether frustrated.

For these reasons we think it should be held that the certification of only one rate is contemplated in Section 522 (c) with respect to a particular currency on a particular date.

II. THE "OFFICIAL" RATE FOR THE BRITISH POUND ON THE DATE IN QUESTION WAS LAWFULLY CERTIFIED BY THE BANK AND LAWFULLY USED IN ASSESSING THE DUTY UPON THE MERCHANDISE IN THIS CASE

The British official rate was the only rate at which, on May 3, 1940, pounds sterling could be purchased in New York City for unrestricted use. Pounds bought at that rate, if they had been obtained through authorized channels in the United Kingdom, could be used for any purpose,

[5] The procedure in appraising the value of imported goods and assessing duties upon them is set forth in the Monograph of the Attorney General's Committee on Administrative Procedure on Administration of the Customs Laws, Sen. Doc. No. 10, 77th Cong., 1st sess., Part 14, at pp. 33–57.

including payment for exported goods of all kinds. Pounds purchased at the "free" rate, on the other hand, could not be used to pay for the goods specified in Order in Council No. 291 of 1940 (R. 120–123). In view, therefore, of the dominant purpose of Section 522 (c) of the Tariff Act to bring about the establishment of a single value for each foreign currency, only the official rate could be used for customs purposes, since any other would not signify such a value and would fail to meet the basic requirement of the statute. The Federal Reserve Bank's certification of this rate, consequently, was in accordance with the statute, and this rate was lawfully used in assessing the duty upon petitioner's importation. The use of the "free" rate would not have been lawful.

The certification of the "free" rate by the Bank was properly disregarded by the Secretary of the Treasury and did not invalidate the correct certification which it accompanied. This Court inferentially held to this effect in *The Collector* v. *Richards*, 23 Wall. 246. In that case the Director of the Mint, pursuant to the Act of March 3, 1873, *supra*, p. 15 n. 3, certified, two values for the French franc to the Secretary of the Treasury, since he was uncertain which one truly represented the "value of the standard coins in circulation" which he was required to furnish. The one was the value of the standard franc as defined by

law; the other was the value of the actual gold content of francs in circulation as assayed at the mint, after they had been reduced in weight by abrasion. The Secretary, in a circular letter, designated the first value as the value to be used by collectors of customs in assessing duties. The issue in the case was whether a value fixed under the Act of 1873 or a value established by a previous Act of Congress should be used. Having decided favorably to the former view, the Court held that the value designated by the Secretary should be used, without any question growing out of the fact that its certification by the Director of the Mint had been accompanied by a certification of an alternative value. The Director of the Mint in effect made findings which submitted to the Secretary a question of law, relating to the proper value to be used. The Secretary decided the question and his decision was sustained by the Court. We contend that the situation in the present case is precisely analogous.

It is probably true as petitioner contends (Br. 28–29) that Section 522 (c) envisages primarily a rate of exchange which is established in an open market on the basis of transactions in that market. This was the typical rate in existence with respect to foreign currencies at the time the Tariff Act of 1930 and its predecessors were enacted. It was natural for Congress to legislate with reference to existing conditions. This does not

signify, however, that when those conditions change the statute requires continued reference to a market which has lost its significance. On the contrary, Section 522 (c) itself recognizes that there may not be a "market buying rate" and provides that in that event the Federal Reserve Bank of New York shall calculate "the buying rate," which is the ultimate fact to be determined, from "actual transactions and quotations in demand or time bills of exchange." The data to be used rest in the informed judgment of the Bank. There is nothing in the Act which requires that the "actual transactions and quotations in demand or time bills of exchange," to which the Bank may refer, must be wholly the result of bargaining. If a governmental decree, domestic or foreign, operates to fix the terms of actual transactions, the Bank is authorized to certify the rate employed, whatever its origins. The norm which Congress envisaged did not result in rigid legislation which could not be adapted to changing circumstances. The Federal Reserve Bank, therefore, proceeded lawfully in giving effect to its judgment that the official rate, which was evidenced by actual transactions, was a rate which it was authorized to certify. This is not questioned by petitioner.

There is no merit in petitioner's contention (Br. 25, 26–27, 30–32) that the "free" rate and the official rate upon the pound sterling were each

"tied up with certain classes or types of merchandise" and that, because the woolen goods involved in this case were paid for with pounds purchased at the "free" rate, this rate should be used in arriving at their value for customs purposes. The Federal Reserve Bank's certification (R. 130–131) contains no indication that such was the situation in the judgment of the Bank. There is no legal basis for contending that if there had been such an indication, it would have been binding upon the Secretary of the Treasury or the collector. The Bank was not empowered to determine what use should be made of the rates which it certified. Its function was solely one of fact determination. Section 522 (c) makes the value of a foreign currency depend upon a rate which the Bank certifies and not upon the class of merchandise which the currency may be used to purchase.

Section 522 (c) does not provide that the buying rate for a currency shall itself be used for customs purposes, but that the "value" of the currency, "measured by the buying rate", shall be used. When a currency is uncontrolled, its value in dollars and the buying rate are the same. When currency control, however, results in several buying rates upon the same currency, it is not the value of the currency which varies with the several rates but the price of the goods which may be purchased with currency ac-

quired at the various rates. The value of the currency is a fact to be ascertained from all available data and may or may not conform to one of the rates which prevails. To the extent that it is higher than a particular rate, the purchaser of currency at this rate, or the foreign exporter of the commodity for which the purchaser will make payment with the currency (depending upon the terms of the sale as affected by the rate in question and the uses to which the currency may be put in the country of origin) will receive an advantage, and the export of the particular commodity will be encouraged to the extent that someone may acquire the currency, not at its value, but for less. See *F. W. Woolworth Co.* v. *United States*, 28 C. C. P. A. (Customs) 239 (1940); 38 Op. Atty. Gen. 489. To say, therefore, that the same low rate must be used in assessing customs duties in this country would be both to controvert the statute, which directs that the value of the currency shall be used, and also to supplement a foreign government's encouragement of exports with a lowered tariff in this country.

There is likewise no basis in the record for any inference that in point of fact goods imported from the United Kingdom were purchased with pounds obtained at the "free" rate of exchange whenever the British decree permitted. Petitioner's assumption that this was done is unsupported by evidence. The Customs Court ex-

cluded testimony which might have established the extent to which there was actually a correlation between the possibility under the British decree of paying for imported goods with such pounds and the actual practice (R. 80–83). A member of the court, however, stated that "I think it is perfectly obvious" and that "we can take judicial notice of the fact" that pounds purchased at the official rate might have been used to pay for any type of importation from the United Kingdom. There is no showing that the supply of pounds purchasable at the "free" rate was always adequate to the needs of importers or that importers' London balances were not used. It has been recorded in a manner of which this Court may take judicial notice (see the use in *United States* v. *Whitridge*, 197 U. S. 135, 145, of "the facts which were known at the time") that "offerings of sterling in * * * free markets have been derived mainly from sterling assets held by nonresidents at the outbreak of the war in the form of banking funds, securities, and other investments; from sterling payments for certain imports by countries in the sterling control area; and from certain other types of current sterling income" and that "until March 1940 it was permissible to pay for nearly all British exports in free sterling, although it is not certain that this was always done." *Review of the Month*, 26 Federal Reserve Bulletin 383 (May 1940). Cer-

tainly in the light of this diagnosis it has not been established that free sterling was used in payment for imports from the United Kingdom to the full extent which was legally possible under the British Order in Council.

Even if it were true that all imports which the British decree permitted to be purchased with pounds obtained at the "free" rate were actually so purchased, it would not follow that the "free" rate should be used for customs purposes. An importer is not entitled to a reduction of duty because he has obtained his goods at a bargain, whether in the purchase price of the goods or in the rate of exchange at which he obtained the currency necessary to pay for them.[7] The law requires that "the value of imported merchandise shall be—(1) the foreign value or the export value, whichever is higher; * * *". Tariff Act of 1930, Section 402, 46 Stat. 708, 19 U. S. C. Sec. 1402 (*infra*, p. 43). "Foreign value" is defined as "the market value or the price at the time of exportation of * * * merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption * * * in the ordinary

[7] Prior to the Tariff Act of July 14, 1832, 4 Stat. 583, duties were "estimated upon the basis of actual cost plus a stated percentage"; but in Section 7 of that Act (4 Stat. 591–592) "the law directed the ascertaining of actual value." Freund, *Administrative Powers over Persons and Property* (1928), p. 556.

course of trade * * *"; "export value" is defined as the value or price "at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported * * * for exportation to the United States". 19 U. S. C. Sec. 1402 (c), (d), *infra*, pp. 43–44.[7]

In view of the foregoing statutory provisions, there clearly is no legal connection between the amount or manner of payment for petitioner's importation of woolen goods and the ascertainment of the duty to be collected. The lack of logic or realism in petitioner's contrary contention is further evidenced by the fact that, whereas he claims the benefit of the free rate of exchange upon the pound as of May 3, 1940, the date of exportation, he actually paid for the goods with pounds purchased on May 22 at an entirely different rate. The rate which petitioner paid was $3.21 on a day for which the Federal Reserve Bank's certification, as of noon, was $3.227187 (R. 90; Br. 30–31), whereas the rate of which he now claims the benefit for customs purposes is $3.475138 (Br. 32). It thus appears that there is no connection, legal, logical, or factual, between the payment which petitioner made for the goods in question and the ascertainment of the proper duty upon them.

[7] It is the value of "such or similar merchandise," and not of the particular merchandise imported, which controls.

III. WHETHER OR NOT THE USE OF THE BRITISH "OFFICIAL" RATE WAS MANDATORY UNDER THE STATUTE, ITS DESIGNATION BY THE SECRETARY OF THE TREASURY AS THE RATE TO BE USED WAS VALID AND MAY NOT BE SET ASIDE BY A COURT

It was a fact, as the Federal Reserve Bank certified, that at noon on May 3, 1940 there were two different buying rates for the pound sterling in the New York market. Pounds could be purchased at either rate to pay for imported goods, although only one would purchase pounds that were usable for all types of goods. The Bank's certification was, therefore, in accord with the situation confronting it. Not one rate, but two, existed; if one alone was legally effective for customs purposes, as we have contended, the reasons lie in the statute. The Bank's certification of both rates necessarily left to others the determination of the uses to be made of them.

The Bank's certification confronted the Secretary of the Treasury with a condition in which no statutory buying rate, applicable to British currency for customs purposes, had as yet been determined, or in which, at best, his publication of the certification as made would have supplied the collectors of customs with two rates without guidance as to which one to use. He was necessarily required to meet this condition, since the Tariff Act still had to be administered. Petitioner argues that the Secretary had no authority

to select one of these rates and order its use; that he was required to publish whatever rates were certified to him; and that the selection of the proper rate should be left to the collectors of customs. We submit that the Secretary and not his subordinates has the power to select a rate and thus to make the difficult determination of the value of a foreign currency upon which there are several buying rates. Hence the Secretary acted properly and within his powers in determining that the "official" rate should be the only rate used for customs purposes, and his action may not be set aside or disregarded.[*]

His authority to issue T. D. 50134 of April 15, 1940, *infra*, pp 49–50, instructing collectors to use only the official rate in converting British pounds

[*] It might be argued that in the absence of a single buying rate in the New York market, certified by the Federal Reserve Bank, with which the proclaimed value of the metallic pound sterling may be compared, Section 522 of the Tariff Act requires that the latter value be used in estimating the dutiable value of goods imported from the United Kingdom. That value on May 3, 1940 was $8.2397 (R. 90). We do not make this contention, however, since the manifest purpose of the Act is to direct the use of the current buying rate for a foreign currency whenever that varies significantly from the value of the corresponding coin. The mode of ascertaining the fact of variance is subordinate to this purpose. The two rates of exchange which in fact prevailed with respect to the pound on the day in question, as appears from the record, whether or not either of these rates was entitled to recognition as the effective rate under Section 522, show clearly that the circumstance envisaged by the Congress had arisen. British currency had depreciated by more than 5 per centum. The dollar value of the gold pound was therefore excluded from use. Cf. *United States* v. *Whitridge*, 197 U. S. 135, 143.

into dollars for customs purposes, stems both from Section 522 (c) of the Tariff Act and from other statutory provisions which authorize him to issue regulations for the government of his department. The authority from both sources is clear and the finality with which it may be exercised is apparent.

Section 522 (c) does not require the Secretary to publish blindly whatever certification may be furnished to him by the Federal Reserve Bank. He is to make the information public "at such times and to such extent as he deems necessary." These words confer full discretion. They contrast with the language of Section 522 (a) with respect to the proclamation of the values of foreign coin, which requires that these values "shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly * * *."

Section 624 of the Tariff Act of 1930, 46 Stat. 759, 19 U. S. C. Sec. 1624, moreover, provides as follows:

> In addition to the specific powers conferred by this Act, the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act.

Section 502 (c) of the same Act, 46 Stat. 731, 19 U. S. C. Sec. 1502 (c) provides that:

> It shall be the duty of all officers of the customs to execute and carry into effect

> all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs.

It is provided in R. S. Sec. 249, 19 U. S. C. Sec. 3, that "The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports as he shall judge best." R. S. Sec. 248, 5 U. S. C. Sec. 242, provides that the Secretary "shall superintend the collection of the revenue."

R. S. Sec. 251, 19 U. S. C., Supp. III, Sec. 66, provides that:

> The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

R. S. Sec. 161, 5 U. S. C. Sec. 22, reads as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his

> department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

The foregoing general provisions taken in conjunction with each other clearly confer upon the Secretary of the Treasury full authority to provide by regulations and instructions for the collection of customs duties, within the statutory framework. This authority has been conferred both in the Tariff Act itself and in the general legislation relating to government departments. It reinforces the discretion conferred by section 522 (c). As will appear from the authorities, its exercise is not subject to review in court except to determine the legality of the actions taken.

In the Tariff Act provision is made for judicial review of the legality of regulations which affect the amount of duty payable. Section 514, 19 U. S. C. Sec. 1514, provides that "decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties[9] chargeable * * * shall upon the expiration of 60 days * * * be final and conclusive upon all persons * * * unless the importer * * * shall, within sixty days

[9] In *United States* v. *Klingenberg*, 153 U. S. 93, it was held (pp. 101–102) that the rate of exchange employed in valuing imported goods for customs purposes enters into the determination of the amount of duties.

* * * file a protest in writing with the collector setting forth distinctly and specifically * * * the reasons for the objection thereto". The sections which follow (19 U. S. C., Secs. 1515–1517) provide for the determination and review of protests so filed, which may be carried to the Customs Court and the Court of Customs and Patent Appeals. It may be conceded that the review which follows upon a protest may extend to the legality of the orders and findings entering into the protested decision; but the extent of judicial reexamination of the determinations of the Secretary which may enter into his "orders and findings" is not specified. The scope of any such reexamination must necessarily be determined according to the nature and scope of the authority conferred upon the Secretary by the statutory provisions under which he acts.

Neither in Section 514 and the subsequent sections of the Tariff Act nor in Section 198 of the Judicial Code, 28 U. S. C. Sec. 310, *infra*, p. 46, governing appeals from the Customs Court to the Court of Customs and Patent Appeals, is provision made for inquiry into the factual and discretionary determinations of the Secretary of the Treasury entering into his formulation of regulations and instructions. It is clear that no such inquiry should be made, for the Secretary's powers were intended to be broadly discretionary and final, except in so far as he might exceed his

authority by transcending statutory or constitutional provisions.

We are not here dealing with the authority of an administrative officer, whether a member of the Cabinet or some other official, to take specified action of a legislative variety, in the form of a general regulation or otherwise, pursuant to precise statutory provisions, such as was involved in *Stark* v. *Wickard*, 321 U. S. 288; *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218; *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126; *United States* v. *Bush & Co.*, 310 U. S. 371, and other cases in this Court. The power involved in this case is the general supervisory power of the head of a department with respect to the functions of that department, coupled with the specific discretionary duty of publishing rates of exchange.

It is clear from the decisions that the administrative supervisory power may be exercised to the fullest extent without judicial interference and that affected private interests may not secure judgments invalidating or disregarding the actions taken, except in cases of clear illegality. *United States* v. *Bailey*, 9 Pet. 238; *Boske* v. *Comingore*, 177 U. S. 459; *Haas* v. *Henkel*, 216 U. S. 462; *Rosen* v. *United States*, 245 U. S. 467. In *Haas* v. *Henkel* and *Rosen* v. *United States* infringements of statutes, involving disregard of departmental regulations prescribed by virtue of the

general authority contained in Section 161 of the Revised Statutes, led to criminal liability—in the *Haas* case for conspiracy to defraud the United States and in the *Rosen* case for the theft of mail matter from a private mail box which had been designated as an authorized depository of mail by the Postmaster General. It seems clear that, if a criminal defendant may not have the benefit of a judicial inquiry into the merits of a regulation which results from an exercise of broad rule-making authority by the head of a department, the petitioner here is not in a position to demand a more searching review of the instruction of the Secretary of the Treasury to the collectors of customs; for, as this Court has noted, "No one has a legal right to the maintenance of an existing [tariff] rate or duty." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 318.

In *Boske* v. *Comingore*, *supra*, the limitations upon judicial review of regulations prescribed pursuant to Section 161 of the Revised Statutes were stated as follows:

> * * * A regulation adopted under section 161 of the Revised Statutes should not be disregarded or annulled unless, in the judgment of the court, it is plainly and palpably inconsistent with law. Those who insist that such a regulation is invalid must make its invalidity so manifest that the court has no choice except to hold that the

> Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

Clearly the conduct of a large government department would be rendered vastly more difficult by any other rule. Section 514 of the Tariff Act, although it contemplates judicial review of regulations which enter into a collector's decisions, does not broaden the scope of this review beyond that which has been defined from the earliest times and recognized as the limit beyond which it would be inappropriate for the courts to go in relation to the type of function here involved.

Section 522 (c) of the Tariff Act does not limit the authority of the Secretary of the Treasury by subjecting his discretion to that of the Federal Reserve Bank. Petitioner is in error in asserting (Br. p. 24) that "the whole subject is confined by the law exclusively to the discretion of the Federal Reserve Bank * * *." The section, it is true, provides that in ascertaining the buying rate in the New York market the bank "may in its discretion" take into consideration various transactions and quotations. Discretion, however, is a word of many meanings. In this context it clearly signifies that the bank shall exercise skill and judgment in its choice of data upon which to rest a technical determination of fact.

Discretion in this sense has nothing to do with the choice of means or of limited ends, in terms of ultimate results to be achieved, such as is involved in the performance of other types of discretionary functions. The exercise of the latter type of discretion, in so far as it may become necessary in determining the use to be made of rates of foreign exchange, as well as in other aspects of administering the customs laws, rests with the Secretary of the Treasury by virtue of the language of Section 522 (c) and his general statutory authority.

The whole history of rates of exchange in relation to customs administration, and the decisions of this Court in relation to the problem, bear out this view. No decision has ever overturned or gone behind a proclamation of the Secretary, conveying the value of foreign coin as found by the Director of the Mint pursuant to statute. Attempts to substitute other, allegedly more appropriate, rates of conversion have uniformly met with failure. *Cramer* v. *Arthur*, 102 U. S. 612; *Hadden* v. *Merritt*, 115 U. S. 25; *United States* v. *Klingenberg*, 153 U. S. 93; *United States* v. *Whitridge*, 197 U. S. 135. In the *Cramer* case the same finality was extended to a consular certificate, made pursuant to statute, with respect to the extent of the depreciation of a foreign paper currency. In that case, also, the Court disregarded evidence of record, indicating that the

Secretary's proclamation of the value of the Austrian silver florin, which affected the case, had continued after that monetary unit had ceased to circulate or serve as a standard in Austria itself. "There must", said the Court, "be an end to controversy somewhere * * *. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty."

Applying these decisions, the Court of Customs and Patent Appeals adopted the view (R. 152) that the legality of the Secretary's instruction, like that of an earlier general order of the Secretary stating the value of the Indian rupee for customs purposes, was to be judged exclusively from the face of the order. *J. K. Clarke* v. *United States*, 17 C. C. P. A. (Customs) 420, T. D. 43,866 (1930). Without adopting so extreme a position here, in view of the wording of Section 514 of the Tariff Act, under which this proceeding arises, we nevertheless think it is clear from the Secretary's instruction of April 15, 1940 to collectors of customs (*infra*, pp. 49–50); from his publication of rates of exchange, dated May 11, 1940 (*infra*, pp. 50–51); and from the facts of record that nothing whatever entered into his determination that the

official British rate upon the pound should be used, which attaches the slightest taint of illegality to it.

The Secretary's action consisted essentially of publishing a fact found by the Federal Reserve Bank and certified to him; of a discretionary determination that this fact, rather than a different rate of exchange, should govern in the conversion of pounds to dollars for customs purposes; and of an instruction to collectors as to how they should perform a given function. Clearly the fact so published cannot be questioned, unless the Secretary usurped the function of the Bank, as certainly he did not. The discretionary determination of which rate to observe was for the Secretary alone to make, if the statute did not provide the answer. The instruction to collectors was expressly made binding upon them by Section 502 (c) of the Tariff Act, *supra*, pp. 31–32; and, since a regulation of a department head is involved, the instruction may properly be disregarded by a court only if "plainly and palpably inconsistent with law" (*Boske* v. *Comingore*, *supra*, p. 35).

The duty of determining the exchange rates on foreign currency, in so far as Section 522 (c) did not provide an alternative means, was cast upon the Secretary of the Treasury by Congress in the exercise of its constitutional powers, including the power to "regulate the Value * * * of foreign Coin" (Constitution, Art. I, Sec. 8,

cl. 5). The performance of this duty then became "an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision * * *. The whole subject * * * [was] confided by law exclusively to the jurisdiction of the executive officers charged with the duty * * *." *Hadden* v. *Merritt, supra,* p. 38. Although the function of the Secretary here involved is different from that reposed in the President by the Tariff Act and involved in *United States* v. *Bush & Co., supra,* it is true here as there that, "for the judiciary to probe the reasoning which underlies" this action "would amount to a clear invasion of the legislative and executive domains." 310 U. S. at p. 380.

It is evident from the nature of both the economic and the administrative consequences of multiple rates of exchange that the discretion conferred upon the Secretary by Congress in the absence of a buying rate, found by the Federal Reserve Bank, which is binding upon him, must be preserved unimpaired if he is not to be prevented from dealing resourcefully with present conditions in international trade and exchange. If we are not sustained in our contention that the British official rate upon the pound was the rate required by the statute on May 3, 1940, then indubitably, we think, the Secretary's instruction established it as the only lawful rate to be used.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment of the Court of Customs and Patent Appeals should be affirmed.

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DECEMBER 1944.

APPENDIX A

STATUTES

Tariff Act of 1930, 46 Stat. 590, c. 497, as amended by the Act of June 25, 1938, 52 Stat. 19 U. S. C. Sec. 1001, et seq.:

SEC. 402. VALUE.

(a) *Basis.*—For the purposes of this Act the value of imported merchandise shall be—

(1) The foreign value or the export value, whichever is higher;

(2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the United States value;

(3) If the appraiser determines that neither the foreign value, the export value, nor the United States value can be satisfactorily ascertained, then the cost of production;

* * * * *

(c) FOREIGN VALUE.—The foreign value of imported merchandise shall be the market value or the price at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale for home consumption to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, including the cost of all containers and coverings of whatever nature, and all

other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

(d) EXPORT VALUE.—The export value of imported merchandise shall be the market value or the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is freely offered for sale to all purchasers in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States.

* * * * *

SEC. 514. PROTEST AGAINST COLLECTOR'S DECISIONS.

Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error

discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. * * *

SEC. 515. SAME.

Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, or pay any drawback found due, of which notice shall be given as in the case of the original liquidation, and against which protest may be filed within the same time and in the same manner and under the same conditions as against the original liquidation or decision. If the collector shall, upon such review, affirm his original decision, or if a protest shall be filed against

his modification of any decision, and, in the case of merchandise entered for consumption, if all duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law.

(SEC. 522 is set forth *supra*, at pp. 2–4.) 28 U. S. C. Sec. 310 (Judicial Code, sec. 198):

Appeals from United States Customs Court.

If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the United States Customs Court as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said Court, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs and Patent Appeals for a review of the questions of law and fact involved in such decision. * * *

APPENDIX B

OFFICIAL COMMUNICATIONS AND REGULATIONS

Letter from Federal Reserve Bank of New York to the Secretary of the Treasury:

MARCH 19, 1940.

DEAR MR. SECRETARY: From advices which we have received from London, we understand that under the Defence (Finance) Regulation Amendment Order, 1939, of the Government of the United Kingdom, from and after March 25, 1940, exchange proceeds in designated currencies, including United States dollars, derived from specified exports from the United Kingdom to certain countries including the United States, the Philippine Islands and all territories under the sovereignty of the United States, must, in effect, be sold to authorized banks for surrender to the Bank of England at such rate of exchange as may be fixed from time to time by or on behalf of the British Treasury, or such exports must be paid for in pounds sterling purchased at such fixed rate of exchange with one of such designated currencies.

In view of the foregoing, we shall, commencing Monday, March 25, 1940, certify to the Secretary of the Treasury pursuant to the provisions of Section 522 of the Tariff Act of 1930, two rates for the pound sterling, one of which will be designated

"free," being the rate we are now certifying, and the other of which will be designated "official," being the rate fixed by or on behalf of the British Treasury, at present $4.03[illegible] United States currency per pound sterling.

Faithfully yours,

L. W. Knoke,
Vice President.

Certification of Rates of Exchange for May 1, 1940:

FEDERAL RESERVE BANK OF NEW YORK,

Date, May 1, 1940.

The Honorable the Secretary of the Treasury.

SIR: In pursuance of the provisions of Section 522 of the Tariff Act of 1930, dealing with the conversion of foreign currency for the purpose of the assessment and collection of duties upon merchandise imported into the United States, we have ascertained and hereby certify to you that the buying rates in the New York Market at noon today for cable transfers payable in the foreign currencies are as shown on the reverse side.

Respectfully,

For you B. J. [illegible]
Foreign Department.

Values of foreign currencies

Treasury Decision No. [illegible] F R [illegible]
Treasury Dec. [illegible]

TREASURY DEPARTMENT, April [illegible]

To Collectors of Customs and Others Concerned

Reference is made to the daily buying rates for foreign exchange which pursuant to [illegible] of the Tariff Act of 1930 (19 U.S.C. title 19, sec. 372 (c)) [illegible] the Federal Reserve Bank of New York to certify to the Secretary of the Treasury. The list of rates certified by the Federal Reserve Bank of New York has included two rates for the Canadian dollar and the Newfoundland dollar since March 22, 1940, two rates for the English pound since March 25, 1940, and two rates for the Australian pound since April 1, 1940. In each case the higher rate has been designated [illegible] the other free.

In order it is necessary to maintain each of the above-mentioned currencies [illegible] treasury of the United States for the purpose of the administration and enforcement of [illegible] provisions, including [illegible] rate based [illegible] the basis of the rate designated [illegible] upon the rate prescribed for the acquisition [illegible] pursuant to section 522 (a) of

the Tariff Act of 1930 (U. S. C. title 31, sec. 372 (a)) varies from such "official" rate by less than 5 per centum. In the latter event the proclaimed rate should be used.

Until further notice only the "official" rates for the named currencies will appear in the weekly issues and bound volumes of the TREASURY DECISIONS. The pertinent facts and circumstances will be kept under review and, should future developments make it advisable, further instructions will be given.

(342.211)

H. MORGENTHAU, JR.,
Secretary of the Treasury.

Treasury Decision No. 50146, 75 Treas. Dec. 388:

TREASURY DEPARTMENT,

OFFICE OF THE COMMISSIONER OF CUSTOMS

Washington D. C., May 11, 1940.

To Collectors of Customs and Others Concerned:

The appended table of the values of certain foreign currencies as certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under the provisions of section 522 (c), Tariff Act of 1930, during the period from May 3 to 9, 1940, inclusive, is published for the information of collectors of customs and others concerned.

By direction of the Commissioner:

(342.211)

W. R. JOHNSON,
Deputy Commissioner of Customs.

Values of Foreign Currencies Certified to the Secretary of the Treasury by the Federal Reserve Bank of New York under Provisions of Section 522 (c), Tariff Act of 1930

Period May 3 to 9, 1940, Inclusive

Country	Name of currency	May 3 dollars
Europe:		
England	Pound Sterling	[1] 4.035000

[1] (Official or Controlled.) • • • The rates for Canadian dollars, Newfoundland dollars, English pounds, and Australian pounds included in this list are for use pursuant to the directions in T. D. 50134.

U. S. GOVERNMENT PRINTING OFFICE : 1944



No. 287

In the Supreme Court of the United States

OCTOBER TERM, 1944

JOHN BARR, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN REPLY TO BRIEF OF THE FEDERAL RESERVE BANK OF NEW YORK AS AMICUS CURIAE

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN REPLY TO BRIEF OF THE FEDERAL RESERVE BANK OF NEW YORK AS AMICUS CURIAE

The brief filed by the Federal Reserve Bank of New York as *amicus curiae* herein assumes a basic position which the Government need not challenge in reply, since Point III of the argument in our principal brief deals with the situation that would follow from the Bank's argument that it was authorized to certify more than one rate of exchange with respect to the British pound on May 3, 1940. Its argument that the rates which it certified are "final and conclusive" is not stressed as against the action of the Secretary of the Treasury in selecting the "official" rate. (Brief of *Amicus Curiae*, p. 42.)

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We have not contended that the Bank proceeded improperly in certifying more than one buying rate for the British pound on May 3, 1940, but have argued merely that the statute contemplated only a single rate and that, under the circumstances of this case, that rate was the "official" rate upon the British pound or was made so by the Secretary's action. The Bank's certification of two rates instead of one left the Secretary of the Treasury, as we contend, under the necessity of determining which rate should be used for customs purposes; and his determination is controlling, either because it is right under the statute or because it is final in the absence of palpable inconsistency with law. It is difficult to discern an adequate reason for the Bank's concern, as expressed in its brief, with the use which is made of the rates certified by it.

In the brief of the Bank there are, in our opinion, several errors which recur in the argument and which, although the answers to them are already contained in our principal brief, should receive brief treatment in the light of the Bank's discussion.

I

Running through topics A and B of Point I of the Bank's brief is a persistent confusion of the market value of imported goods with their cost to the importer. Mention is made (pp. 20–21) of authorities which allegedly rec-

ognize that the rate for foreign exchange "with which imported merchandise is purchased is the sound measure of value of the foreign currency to be used in the computation of dutiable values in dollars * * *, and that the use of such rates produces values * * * which are, or most nearly approximate, the actual dollar values of the imported merchandise." *United States* v. *Whitridge*, 197 U. S. 135, is quoted (p. 21) as referring to "actual cost or market value" of goods as though these were the same for *ad valorem* duty purposes. These expressions, however, must be understood in the light of conditions at the time they were uttered, when as we have pointed out (Govt. brief, pp. 22–23, 24), the value of a foreign currency was the same as the rate at which exchange could be purchased and the payment made for goods was, therefore, the same as their value in the same currency.

Our brief (pp. 27–28) has already emphasized the distinction between the cost, or price, of imported goods and their value. Section 402 of the Tariff Act clearly requires that customs duties be assessed upon their value (ordinarily their value abroad) and not upon their cost. The rate of exchange upon the currency with which they were purchased does not properly enter into a computation of their value in dollars unless it states the relationship between the value of the currency in which the goods must be valued and United States dollars. Unless the rate

of exchange between the foreign currency and American dollars, which is used for customs purposes, is the same as the rate prevailing at the place of exportation, either generally or with respect to the proceeds of the exported goods, it introduces inaccuracy into the calculation. Therefore the Bank's insistence that the rate of exchange used in paying for goods should also be used in valuing them for customs purposes breaks down.

The problem and its correct solution are highlighted by the situation disclosed in the footnote on page 15 of the Bank's brief. In that situation, involving the currency of Brazil, the American importer is unable to purchase Brazilian goods by acquiring Brazilian foreign exchange in New York. He must remit in dollars which the Brazilian exporter may then convert into cruzeiros, partly at a Brazilian "official" rate and partly in the open market. There is, therefore, no buying rate for Brazilian currency in New York which has any relation to payment for the goods. Nevertheless, goods imported from Brazil must initially be valued in cruzeiros for customs purposes and, if a value in dollars is to be obtained, a rate of conversion must be used despite the fact that the importer does not buy cruzeiros at all. In other words, the method of payment for goods has basically nothing to do with valuing them for customs purposes or assessing the duty upon them.

The brief of the Federal Reserve Bank (p. 25) attempts to bolster the argument that the value of imported goods should be converted into dollars at the rate of exchange employed in paying for the goods, by referring to the "obvious analogy" which is said to exist "where the different currencies of several countries have a common designation," such as pounds. The analogy is false and misleading. The name of a currency has nothing whatever to do with its value or its identity. The fact that several currencies have the same name does not render them the same, and they necessarily have independent values. The value of imported goods must be ascertained with reference to a currency which is used in the country from which the goods were exported. It is the conversion of that currency into United States dollars which presents the present problem. It may at times be true, as a footnote (n. 20) on the same page of the Bank's brief points out, that two or more currencies of different character may circulate in a single foreign country. When this is true, as is plainly pointed out in passages from the Customs Regulations which the footnote quotes (Art. 776 (f), (i), Customs Regulations of 1937 as amended by T. D. 50251, 76 Treas. Dec. 111, 115–116), the goods are valued with reference to "the currency in which such or similar merchandise is usually bought and sold in the ordinary course of trade" (Art. 776 (i))—not in the currency which may have been paid for them by the

particular importer. The Bank's argument consequently answers itself.

II

The statement is made (Brief of *Amicus Curiae*, p. 36) that "Section 522 (c) deals essentially with orders in the form of cable transfers pertaining to foreign currency credits. It is the different attributes and prices of such orders and credits that are material * * *, not the attributes and prices of actual foreign paper currency and coins." We submit that Section 522 (c) deals "essentially" with the value of foreign currency (which of course means credits as well as paper currency and coins); and the price of cable transfers is significant only in so far as it throws light upon that value. The assertion (pp. 38–39) that the collector of customs should in all cases use the rate of exchange paid by the importer in order to make payment for the goods to be valued, ignores the central problem and overlooks the lack of correspondence which may arise between a given rate of exchange and the value of a foreign currency upon which there are several such rates. A rate for cable transfers, which registers supply and demand in the particular market as affected by legal restrictions, domestic and foreign, is no more and no less significant as respects a given currency than a rate for paper money and coins would be.

III

The statement is made (Brief of *Amicus Curiae*, p. 39) that "application of the opinion of the Court of Customs and Patent Appeals would require the use in all cases of a dollar value of foreign currency fixed by the foreign country of export at any figure, however arbitrary." This is not true. The Court of Customs and Patent Appeals does not state, and no contention has been made in this case, that a foreign "official" rate must always be used, whenever there is such a rate. The British official rate upon the pound, for reasons stated in our principal brief, was, we believe, the rate which conformed to the requirements of Section 522 (c) of the Tariff Act on May 3, 1940; but it does not follow that a rate upon a foreign currency which happened to be denominated "official" would always conform to the statute. The question always is whether there is a buying rate on the New York market which can be said to be "the buying rate" and to represent the value of the foreign currency. Whether such a rate is "official" or "free" or something else, it is the rate which should be used. If, as here, several rates exist which the Bank deems worthy of certification, the Secretary of the Treasury must determine which, if any, to publish and use.

IV

The Bank's brief asserts (p. 22, n. 18) that Congress "did not intend that any foreign manipulation [of currency] should be compen-

sated for by reciprocal manipulation by the Federal Reserve Bank of New York of a rate of foreign exchange certified under section 522 (c)." With this conclusion we fully agree. The Bank is made a fact-finding agency by Section 522 (c). Manipulation of any kind is not one of its functions. Any considerations of international commercial policy which, under the statute, may properly enter into a determination of the rate of exchange to be used for customs duty purposes are for the Secretary of the Treasury and not the Bank to take into account. The Bank can only perform its fact-finding function of reporting "the buying rate" as its expert judgment dictates. The Secretary must deal with the situation so revealed, as required by law and by his exercise of the responsible discretion conferred upon him.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
PAUL P. RAO,
Assistant Attorney General.
RALPH F. FUCHS,
JOHN R. BENNEY,
JOSEPH F. DONOHUE,
Special Attorney.

DECEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945

FILE COPY

No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

JOHN BARR, PETITIONER,

against

THE UNITED STATES OF AMERICA.

BRIEF OF AMICUS CURIAE

WALTER S. LOGAN,
Attorney for Federal Reserve Bank
of New York, *Amicus Curiae.*

RUFUS J. TRIMBLE
LYON BOSTON
of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 287

JOHN BARR, PETITIONER,

against

THE UNITED STATES OF AMERICA.

BRIEF OF FEDERAL RESERVE BANK OF NEW YORK, AMICUS CURIAE

This brief is filed with the consent of the parties to the case.

Opinions Below

The opinion (R. 134-142) of the United States Customs Court, the trial court, is reported in C.D. 801, Treasury Decisions, advance sheets August 12, 1943, Volume 79, No. 7, page 14. The opinion of the United States Court of Customs and Patent Appeals (R. 145-153) is reported in 143 Fed. (2d) 132; and C.A.D. 279, Treasury Decisions, advance sheets July 6, 1944, Volume 79, No. 54, page 28.

Jurisdiction

The judgment of the Court of Customs and Patent Appeals was entered on May 22, 1944 (R. 153). The peti-

tion for a writ of certiorari was granted October 9, 1944 (R. 155). The jurisdiction of this Court is invoked under section 195 of the Judicial Code (28 U.S.C. §308).

Statement

Section 522(c) of the Tariff Act of 1930[1] provides that the Federal Reserve Bank of New York shall determine the buying rates in the New York market for cable transfers[2] payable in foreign currencies and, in any case where there is no market buying rate for such cable transfers, shall calculate such rate, and shall certify such rates daily to the Secretary of the Treasury who shall make them public at such times and to such extent as he deems necessary. Such rates are certified for use in converting foreign currency into currency of the United States for the purpose of the assessment and collection of *ad valorem* customs duties upon merchandise imported into the United States.

Since the statute specifies a market buying rate at noon, the rate so determined and certified by the Federal Reserve Bank of New York for the currency of a foreign country is the price at which cable transfers payable in the currency of

[1] Section 522 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, 46 Stat. 739; 31 U.S.C. §372) is set forth in full in the Appendix hereto (pp. i, ii).

[2] A "cable transfer" may be defined as an order transmitted by cable to pay a certain sum of money to a designated payee. Djorup, "Foreign Exchange Accounting" 1926, ed., p. 44; *Oshinsky* v. *Taylor*, 172 N. Y. Supp. 231, at p. 232 (App. Term 1st Dept. 1918); and see *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.*, 172 App. Div. 16, at p. 19 (1st Dept. 1916) 157 N. Y. Supp. 955. The rate for cable transfers has been termed the basic rate upon which other foreign exchange rates, the demand and time rates, are built. Frank A. Southard, Jr., "Foreign Exchange Practice and Policy", McGraw-Hill Book Company, Inc., New York and London, 1940, p. 86. Pertinent excerpts from this book are set forth in the Appendix hereto (pp. ii-vi).

such foreign country are bought, or bid for, in substantial amounts by dealers in foreign exchange at noon in the free and open foreign exchange market in New York.[5] "If there is no market buying rate for such cable transfers" exactly at noon, then the rate certified is a rate which the Federal Reserve Bank of New York calculates, in the exercise of its judgment and discretion in accordance with the terms and intent of section 522(c), as the rate which would have been the market buying rate had there been transactions or firm bids at that time in an active market with adequate supply and demand.

Section 522(a) directs the Director of the Mint to estimate the value of the pure metal of the standard coins in circulation of the various nations of the world and directs the Secretary of the Treasury to proclaim the value thus estimated. Sections 522(b) and (c) provide that the value thus estimated and proclaimed shall be used in converting the foreign currency into currency of the United States unless the value so proclaimed varies by 5% or more from the value of such currency measured by the rate for cable transfers payable in such foreign currency certified by the Federal Reserve Bank of New York, in which event, or if no value has been proclaimed, the rate so certified shall be used.

Until March 25, 1940, the Federal Reserve Bank of New York had determined and certified daily a single rate of exchange for pounds sterling, and the Secretary of the Treasury had published, and the Collector of Customs had used, such rate. (Stipulation, par. 6, R. 89-90, offered R. 39-40; Exhibit 6, R. 129, offered R. 42; see T.D. 50134) The pounds sterling proceeds of all such exchange were lawfully usable in payment of the purchase price of any and

[5] Southard, "Foreign Exchange Practice and Policy", *supra*, Note 2, pp. 35, 36, 76-79, Appendix pp. ii-iv.

all imports into the United States from the United Kingdom. (R. 77)

Prior to March 25, 1940, the Government of the United Kingdom had established certain financial and exchange control[4] within the United Kingdom (Stip. par. 3, R. 88-89; Exh. 1, 2 and 3, R. 92-120, offered R. 41), and effective on that date it required payment for whisky, furs, tin, rubber and jute exported to the United States to be made by the United States importers either in United States dollars, or with pounds sterling purchased from the Bank of England or other authorized dealer at the "Official" rate of exchange fixed by the British Treasury. (Stip., par. 4, R. 89; Exh. 4, R. 120-123, offered R. 42) The purchase price of any and all products, other than the five specified, exported from the United Kingdom to the United States,[5] including merchandise of the character involved in this case, continued to be lawfully payable with pounds sterling purchased in the open market at the "Free" rate of exchange. (R. 77) Beginning March 25, 1940, therefore, the Federal Reserve Bank of New York determined that there were two rates of exchange for pounds sterling for use in converting pounds sterling into currency of the United States for the purpose of the determination of the dollar value of imported merchandise, and accordingly certified to the Secretary of the Treasury, pursuant to section 522(c), two rates for pounds sterling, one of which it denominated "Official", being the rate fixed by the British Treasury and required

[4] For a brief description of "exchange control" see Ezekiel Mordecai, "Commercial Pan America—A Monthly Review of Commerce and Finance" Volume X, Nos. 9 and 10, September and October 1941, at page 374. For the convenience of the court the relevant excerpt is attached in the Appendix (p. vi).

[5] Whether during the period from March 25, 1940 to May 9, 1940 in addition to the five products, the export of diamonds could not be paid for with pounds acquired at the "Free" rate is not clear. The situation was not a matter of public record. (R. 78, 83-85; Exhibit 10, R. 133-134, offered R. 84)

by the law of England for the purchase of pounds sterling used in payment of the purchase price of the five specified products, and the other of which it denominated "Free", being the rate in the New York open market for foreign exchange payable in pounds sterling, which exchange could be lawfully used in payment of the purchase price of any and all other exports from the United Kingdom to the United States. (Stip. par. 8, R. 90; Exh. 6 and 7, R. 128-132, offered R. 42)

The Petitioner imported certain woolen fabrics which were exported from England on May 3, 1940 and invoiced in pounds sterling. The Petitioner paid the purchase price of the imported merchandise by means of pounds sterling exchange purchased at the "Free" rate. (Stip. par. 10, R. 90-91) On the date of exportation, the two rates for the pound sterling certified by the Federal Reserve Bank of New York to the Secretary of the Treasury were $4.035000 "Official", and $3.475138 "Free". (Stip. par. 8, R. 90; Exh. 7, R. 130-132) The proclaimed rate (pure metal value) in effect on the date of exportation was $8.2397. (Stip., par. 9, R. 90; T. D. 50125) Pursuant to instructions issued by the Secretary of the Treasury to Collectors of Customs to convert the pounds sterling of an invoice into currency of the United States at the "Official" rate in cases where the "Official" rate certified by the Federal Reserve Bank of New York varied by 5% or more from the proclaimed rate (T. D. 50134; 5 Fed. Reg. 1447; T. D. 50146), the Collector of Customs at New York, the port of entry, determined the dutiable value of the imported merchandise by converting the currency of the invoice at the "Official" rate of $4.035. (Stip., par. 12, R. 91)

Petitioner filed protest against the Collector's action,

claiming the currency of his invoice should have been converted at the "Free" rate of exchange (R. 6-7).

The United States Customs Court reviewed the history of the efforts of the United States Government to determine the true dollar values of imported merchandise for the purpose of the assessment and collection of *ad valorem* customs duties from the earliest statutes,[6] which fixed the values of foreign currencies based upon the pure metal values of the coins of such currencies, to the present law[7] authorizing the Federal Reserve Bank of New York to determine the rates of foreign exchange as the measures of values of foreign currencies for such purpose. After consideration of cases pertinent to this legislative history, the court held that, under the well known rule of statutory construction, the single noun "rate" (as used in section 522(c) requiring the Federal Reserve Bank of New York to determine and certify "the buying rate for cable transfers payable in the foreign currency so to be converted") was applicable in the plural, since such an interpretation was necessary in order to give effect to the legislative intent to base *ad valorem* duties upon the true dollar value of the imported merchandise ascertained from the actual purchase price and market value thereof. The Customs Court further held that when the Federal Reserve Bank of New York had certified to the Secretary of the Treasury two rates for the pound sterling, one denominated "Official" and

[6] Beginning with the Act of July 31, 1789, sec. 18, 1 Stat. 41 (First Congress Sess. I, Chap. V).

[7] Section 403 of the Emergency Tariff Act of 1921, Act of May 27, 1921, c. 14, 42 Stat. 17, first enacted the new provisions authorizing the certification of rates by the Federal Reserve Bank of New York. Section 403 was reenacted, without any change pertinent to the issues of this case, as section 522 of the Tariff Act of 1922, 42 Stat. 974, and as section 522 of the Tariff Act of 1930, 31 U. S. C. §372.

the other "Free", the determination of such rates by the Federal Reserve Bank of New York was final and conclusive and the Secretary of the Treasury had no discretionary power to vary, set aside or nullify such determination and had no power or discretion either to reject both rates or to determine which of the two certified rates was proper; that it was the duty of the Secretary of the Treasury under section 522 to publish both rates certified to him; that the Collector of Customs in converting the currency of the invoice at the rate denominated "Official" had acted unlawfully; and, in effect, that it was the duty of the Collector to use for such conversion the lower rate denominated "Free" in order to determine the actual purchase price in dollars and the market value in dollars, and hence the dutiable value in dollars, of the imported woolens.

On appeal, the United States Court of Customs and Patent Appeals, in the judgment under review, reversed the judgment of the United States Customs Court, and held that the selection by the Secretary of the Treasury of one of the two rates for pounds sterling so certified by the Federal Reserve Bank of New York, and the publication by the Secretary of the Treasury of the rate so selected in a manner on its face conforming to the law, "is conclusive and binding on the court and will not be subject to judicial inquiry as to its correctness." (143 Fed. (2d) 132, at page 136; see also page 135; R. 151 and 152)

In the course of its opinion, the United States Court of Customs and Patent Appeals stated (*ibid.* at page 135; R. 152):

> "We are of opinion that section 522(c), *supra*, contemplates the finding of a single buying rate of exchange. This we think is obvious from a reading of the section. There is but one standard of currency in Great Britain; namely, the pound sterling. This is not controverted. If section

> 522(c) were to be construed to mean that any number of buying rates on the New York market could be certified by the Federal Reserve Bank of New York, the ultimate result as far as tariff laws are concerned would obviously be 'confusion worse confounded'. Furthermore, anything in Great Britain could be purchased for pounds sterling converted at the 'official' rate. Such is not the case with 'free' pounds.
>
> "The Secretary of the Treasury published only the buying rate of pounds sterling at the 'official' rate. That was *the all-inclusive* buying rate of pounds. Therefore, the publication by the Secretary of T. D. 50134 on its face conformed to the law and is conclusive and binding on the courts and will not be subject to judicial inquiry as to its correctness, and since the collector's action conforms to the direction of such decision it must be sustained."

The court further stated (at page 136; R. 153):

> "It is not necessary to consider other contentions made herein, nor the history of the legislation leading up to the present tariff statutes here involved in view of what has been said, nor is it necessary to discuss the many cases from the beginning of tariff history to the present time which have been cited by the parties."

The purpose of this brief of the Federal Reserve Bank of New York as *amicus curiae* is to urge this Court to affirm the view of the trial court, that the certification by the Federal Reserve Bank of New York of both the "Official" rate and the "Free" rate for pounds sterling was appropriate and consistent with section 522(c) of the Tariff Act. This is the issue with which the Federal Reserve Bank of New York is concerned. It is not concerned with the decision of the United States Court of Customs and Patent Appeals to the effect that when the Federal Reserve Bank of New York certifies more than

one rate for the currency of a foreign country, the action of the Secretary of the Treasury in selecting one of such rates for use in the conversion of such foreign currency is conclusive and binding and not subject to judicial inquiry as to its correctness; except that it necessarily follows from the arguments in POINT I of this brief that the procedure followed by the Treasury Department results in defeating the intent of Congress to base *ad valorem* duties on the actual purchase price and market value of the imported merchandise.

As the selection by the Secretary of the Treasury of the "Official" rate was held by the Court of Customs and Patent Appeals to be final, it was immaterial to the Court's decision whether or not an additional rate had been certified by the Federal Reserve Bank of New York. In view of this, the Court's statement to the effect that the statute contemplated the certification of only one rate by the Federal Reserve Bank of New York is dictum. However, the Federal Reserve Bank of New York is charged with the duty, under section 522(c) of the Tariff Act of 1930, of determining and certifying foreign exchange rates, in accordance with the law and the intent of Congress, for use in the assessment and collection of customs duties. It is a matter of public concern, as well as of special interest to the Bank, that any uncertainty which may exist by reason of the dictum of the Court of Customs and Patent Appeals, as to the authority of the Federal Reserve Bank of New York under section 522(c) to certify more than one rate for foreign exchange payable in the currency of a single foreign country when more than one such rate actually exists in the New York market, should be removed.

The Bank's duty is an important one. In the calendar year 1941 the reports of the Department of Commerce indicate that merchandise valued at more than $150,000,000

subject to *ad valorem* duties aggregating approximately $30,000,000 was imported into the United States from countries for the currencies of which dual or multiple rates were certified.[8] The use of "Official" and similar rates fixed by foreign governments, instead of the "Free" rates, in the conversion of foreign values of merchandise imported into the United States subject to *ad valorem* custom duties, would compel importers of the United States to pay higher custom duties than those which, it is submitted, were intended to be imposed by Congress.[9]

The discontinuance in every case of the certification of more than one rate for the currency of a single foreign country would terminate a practice which began in 1936 and has been continued ever since. Dual and multiple rates of foreign exchange exist, and have existed for several years, with respect to the currencies of numerous foreign countries.[10] The record in this case shows that dual rates were

[8] Report of the U. S. Department of Commerce on "Foreign Commerce and Navigation of the United States for the Calendar Year 1941", Table No. 1, at pp. 12-219. The aggregate figures are derived from a reclassification by countries of the commodities imported, subject to *ad valorem* duties, from Argentina, Australia, Brazil, Canada, Chile, Iran, Newfoundland (and Labrador), United Kingdom and Uruguay, and from a calculation of duties on such imports at the rates of duties shown in the Table.

[9] Exhibits 7 and 8 (R. 130-132, offered R. 43) show that the differences between the two rates certified for each of seven foreign currencies on May 3, 1940, were approximately as follows:

England	—"Official"	16% higher than "Free"
Australia	—"Official"	17% higher than "Free"
Canada	—"Official"	8% higher than "Free"
Newfoundland	—"Official"	8% higher than "Free"
Brazil	—"Official"	20% higher than "Free"
Chile	—"Official"	29% higher than "Export"
Uruguay	—"Controlled"	69% higher than "Non-Controlled".

[10] United States Tariff Commission Report to Committee on Ways and Means, House of Representatives (1934), pp. 1 and 2. The pertinent excerpt is set forth in the Appendix (pp. vii-viii); Southard, *supra*, Note 2, pp. 188-189, Appendix pp. v-vi.

certified on May 3, 1940, for currencies of seven countries (Exh. 7, R. 131). The following Treasury Decisions, of which the Court will take judicial notice, also show the certification of such dual rates:

Country	Currency	Treasury Decision Reference
Brazil	milreis	T.D. 48467, Aug. 8, 1936
Brazil	milreis	T.D. 49893, June 19, 1939
Chile	peso	T.D. 49278, Dec. 6, 1937
Uruguay	peso	T.D. 49899, June 26, 1939
Canada	dollar	T.D. 50134, Apr. 15, 1940
Newfoundland	dollar	T.D. 50134, Apr. 15, 1940
England	pound sterling	T.D. 50134, Apr. 15, 1940
Australia	pound	T.D. 50134, Apr. 15, 1940

Since May 3, 1940, dual or multiple rates have also been certified for currencies of certain additional countries, one of which certifications (for the Argentine peso) is shown by a Treasury Decision (T. D. 50354, March 28, 1941).

Questions Presented

1. When more than one rate of exchange exists for currency of a foreign country, is the Federal Reserve Bank of New York authorized by section 522(c) of the Tariff Act of 1930 to determine and certify to the Secretary of the Treasury more than one of such rates?

2. Was the Federal Reserve Bank of New York authorized by section 522(c) of the Tariff Act of 1930 to determine and certify to the Secretary of the Treasury two rates for pounds sterling in the case at bar?

Statute Involved

Section 522 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, 46 Stat. 739; 31 U.S.C. §372) is printed in the Appendix hereto, at pages 49-50.

SUMMARY OF ARGUMENT

POINT I

Section 522(c) of the Tariff Act of 1930 authorizes the Federal Reserve Bank of New York to determine, and certify to the Secretary of the Treasury, more than one buying rate for cable transfers payable in currency of a foreign country when in fact there is more than one such rate in the New York market for foreign exchange lawfully used by importers in payment for merchandise imported into the United States from such country.

A. *This interpretation of section 522(c) is required to carry out the purpose and intent of the section as shown by the legislative history of section 522.*

B. *That section 522(c) authorizes the certification of rates of exchange the use of which will produce, or most nearly approximate, the actual dollar values of the imported merchandise, is the only interpretation of that section consistent with the fundamental principles upon which the tariff acts have always been based.*

C. *The fact that section 522(c) uses the words "the rate" instead of the words "the rate or rates" does not defeat the purpose of the statute.*

POINT II

Upon the facts in this case the Federal Reserve Bank of New York was authorized by section 522(c) of the Tariff Act of 1930 to determine and certify to the Secretary of the Treasury two rates for pounds sterling.

POINT III

The rate or rates for foreign exchange payable in currency of a single foreign country determined and certified by the Federal Reserve Bank of New York, pursuant to section 522(c) of the Tariff Act of 1930, are final and conclusive and not subject to judicial review.

ARGUMENT

POINT I

Section 522(c) of the Tariff Act of 1930 authorizes the Federal Reserve Bank of New York to determine, and certify to the Secretary of the Treasury, more than one buying rate for cable transfers payable in currency of a foreign country when in fact there is more than one such rate in the New York market for foreign exchange lawfully used by importers in the payment for merchandise imported into the United States from such country.

A. *This interpretation of section 522(c) is required to carry out the purpose and intent of the section as shown by the legislative history of section 522.*

It is clear from the legislative history of section 522 and the cases pertinent thereto that it has been the effort and purpose of the Congress of the United States to ascertain as nearly as practicable the market value in dollars, of imported merchandise subject to *ad valorem* customs duties, by the use of the foreign exchange rate for the currency of the invoice when the value of the currency measured by such rate differed materially from the metallic value of that currency.

The continuous efforts of Congress to devise and put into effect a practicable solution of the difficult problem of valuing foreign money so that the true dollar values of imported merchandise may be computed for the assessment and collection of *ad valorem* customs duties are reflected in the numerous Federal statutes enacted for the purpose. These efforts of Congress culminated in the present provisions of section 522(c) of the Tariff Act of 1930 (first enacted in 1921, see Note 7, *supra*).

The first statute for the collection of duties computed upon the values of the merchandise in currency of the United States was the Act of July 31, 1789 (c. V, sec. 18, 1 Stat. 41, Note 6, *supra*). For the purpose of ascertaining dutiable values, it prescribed specific dollar values of selected units of foreign coins and currencies, probably those which at that time were most in use as currency

within the United States.[11] The statutory values were based upon the pure metal content of coins.[12]

Subsequent to the enactment of the Act of July 31, 1789, war broke out among the nations of Europe and in some of those nations, specie payments were suspended and fiat moneys, that is currencies based only on government credit, were adopted. This resulted in depreciation of the values of those currencies in United States money, so that the statutory metallic values were no longer measures of the true dollar values of imported merchandise purchased with such currencies. This led to the enactment of the Act of March 2, 1799 (Fifth Cong. Sess. III, c. XXII,

[11] See the opinion of the lower court reported in *The Collector* v. *Richards*, 23 Wall. 246, at pages 250 and 252 (1874).

[12] The Act of July 31, 1789 further provided that all other denominations of money should be estimated "in value as near as may be" to such prescribed values, sec. 18, 1 Stat. 41. This method of fixing by statute the values of foreign currencies for customs purposes was discontinued by the Act of March 3, 1873 c. CCLXVIII, secs. 1, 2 (17 Stat. 602), except as to the par of exchange for the pound sterling which was discontinued by the Emergency Tariff Act of 1921, *supra*, Note 7. Statutes relating to prescribed values of foreign currencies for customs purposes which were enacted between the Act of July 31, 1789 and the 1873 Act, *infra*, Note 14, were: Act of September 29, 1789, c. XXII, sec. 3, 1 Stat. 95; Act of August 4, 1790, c. XXXV, sec. 40, 1 Stat. 167, and par. 2 of sec. 74, and sec. 75, of the same act, 1 Stat. 178; Act of March 3, 1791, c. XIX, 1 Stat. 215; Act of May 2, 1792, c. XXVII, sec. 17, 1 Stat. 262; Act of March 2, 1799, c. XXII, sec. 61, 1 Stat. 673; Act of March 3, 1801, c. XXVIII, secs. 1 and 2, 2 Stat. 121; Act of July 27, 1842, c. LXVI, secs. 1 and 2, 5 Stat. 496; Act of March 3, 1843, c. XCII, 5 Stat. 625; Act of March 3, 1845, c. XLV, 5 Stat. 740; Act of May 22, 1846, c. XXIII, 9 Stat. 14; Act of March 2, 1861, c. LXXV, 12 Stat. 207. It appears that until 1857 the values placed upon foreign coins when such coins were used in the United States in payment of debts differed from the values placed by these statutes upon foreign currencies for the ascertainment of the dutiable values in dollars of imported merchandise (see *The Collector* v. *Richards*, *supra*, Note 11, at page 260 and also pages 251 and 252).

sec. 61, 2nd par., 1 Stat. 673). A proviso in this Act authorized the President to establish regulations for computing duties on imported merchandise "in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government".[13]

Cramer v. *Arthur*, 102 U. S. 612 (1880) (at page 617).

These provisions remained in effect until the enactment in 1921 of the provisions now contained in section 522(c) of the Tariff Act of 1930.

Pursuant to this proviso in the 1799 Act, market rates for depreciated currencies were obtained through consular officers in foreign countries under regulations providing that when an invoice was made out in a depreciated currency a consular certificate should be attached to the invoice stating the value of the depreciated currency in terms of United States currency.

Cramer v. *Arthur*, *supra*;

Brown & Roese v. *United States*, 31 T.D. 509, at pages 510-511, T.D. 38861 (Gen. Appr. 1916);

United States v. *J. Allston Newhall & Co.*, 91 Fed. 525, at pages 530-531 (Cir. Ct., Mass. 1899); App. dism. 92 Fed. 1023 (C.C.A. 1st 1899).

Because of dissatisfaction with the system of fixing metallic values by statute, Congress in 1873 adopted a new

[13] Act of March 2, 1799, proviso of sec. 61, 1 Stat. 673, which was incorporated into the Revised Statutes with only formal changes as section 2903 and remained in force until repealed by section 403(d) of the Emergency Tariff Act of 1921, *supra*, Note 7, which Act substituted the provisions of section 522(c) for the provisions of both this proviso and the proviso of section 25 of the Act of August 27, 1894, c. 349, 28 Stat. 552. The latter vested in the Secretary of the Treasury authority to determine and use a foreign exchange rate in ascertaining dutiable values in dollars.

method by enacting a statute[14] directing the Director of the Mint to estimate annually the pure metal value of coins of standard value which were "standard coins in circulation of the various nations of the world", and directing the Secretary of the Treasury to proclaim such values.[15] These provisions (with an amendment requiring quarterly, instead of annual, estimates and proclamations) constitute the present section 522(a) of the Tariff Act of 1930.[14]

As this Court pointed out in the *Cramer* case, the use of official instrumentalities to fix the values of foreign moneys for the purpose of assessing customs duties was "devised for the purpose of making a nearer approximation to the actual state of things" (p. 619), and "The Government gets at the truth, as near as it can, and proclaims it" (p. 617), and, as a means to that end, statements in invoices of the actual cost in foreign currency of the imported merchandise "usually furnish the basis for estimating the actual values of the goods" (p. 618).

As stated in *Detrick* v. *Balfour*, 8 Fed. 468 (Cir. Ct.

[14] Section 1 of the Act of March 3, 1873, c. 268 (17 Stat. 602) entitled "An act to establish the custom house value of the sovereign or pound sterling of Great Britain, and to fix the par of exchange." (The sovereign was the gold coin that had the value of a pound sterling, there being, strictly speaking, no standard pound sterling coin.) Section 2 of the Act contained a statutory value of $4.8665 for the pound sterling designated the "par of exchange". Sections 1 and 2 were incorporated into the Revised Statutes in sections 3564 and 3565, respectively. Section 3564 was superseded by the Act of October 1, 1890, c. 1244, sec. 52, 26 Stat. 624, which reenacted the section except that quarterly instead of annual estimates and proclamations were required. Section 52 was reenacted without change by the Act of August 27, 1894, c. 349, 28 Stat. 552, and reenacted in turn in section 403 of the Emergency Tariff Act of 1921, in section 522 of the Act of Sept. 21, 1922 and as section 522(a) of the present Tariff Act of 1930. Section 3565 Rev. Stat. was repealed by the Emergency Tariff Act of 1921.

[15] The provision refers to "standard coins . . . in a perfect state, and . . . the actual amount of pure metal in each." See *The Collector* v. *Richards*, *supra* Note 11, at p. 259.

Cal., 1881), with respect to the 1873 Act (at page 471):

> "The object seems to be to get at the real, actual value of the foreign coin in the money of the United States. *Collector* v. *Richards*, 23 Wall. 246. By obtaining the actual value of the foreign coin in our own money, we obtain the actual value of the goods estimated in foreign coins in the money of the United States."

Section 25 of the Act of August 27, 1894, reenacted the 1873 provisions as to the estimation of metallic values by the Director of the Mint and proclamation of them by the Secretary of the Treasury, and added a new proviso which authorized the Secretary to order the reliquidation of any entry at a value different from the proclaimed metallic value of the foreign coin "whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."[16]

[16] Act of August 27, 1894, c. 349, sec. 25, 28 Stat. 552, reads as follows:

> "That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint, and be proclaimed by the Secretary of the Treasury immediately after the passage of this act and thereafter quarterly on the first day of January, April, July, and October in each year. And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed, and the date of the consular certification of any invoice shall, for the purposes of this section, be considered the date of exportation: *Provided*, That the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred."

The meaning of the new proviso in the 1894 Act was passed upon by this Court in *United States* v. *Whitridge*, 197 U. S. 135 (1905). In that case the foreign value of the imported merchandise was stated in rupees of India. At the date of exportation the exchange value of the rupee exceeded its metallic value as proclaimed by the Secretary of the Treasury (apparently 32 cents and 20.7 cents, respectively). Upon a reliquidation of duties ordered by the Secretary, the exchange value was used by the Collector for the conversion of the foreign value of the merchandise. The importer contended that the proviso of the statute meant merely that the Secretary might direct the use of some other metallic (bullion) value than that proclaimed, and that the exchange value used by the Secretary was, therefore, improper; and further that the only power of the Secretary to use a foreign exchange value and thus take up the fluctuations in exchange was under the proviso of the 1799 Act which limited the use of the exchange value to depreciated currencies and did not authorize the use of an exchange value for an appreciated currency. The Supreme Court, in reversing the lower court, sustained the use by the Secretary of the Treasury of the foreign exchange rate. Mr. Justice Holmes, who rendered the opinion for a unanimous court, stated (at page 142):

> "On the other side we start with the consideration that to an *ad valorem* tax it must be an object to ascertain the true value of the thing taxed at the time as of which it is taxed, and that the invoice price is referred to only to that end. The history of the statutes shows a series of continually closer approximations to it, and to our mind helps the contention of the Government, not that of the other side. The statutes began by fixing the rates for specified coins absolutely. Then, in 1873, they provided in the language of the first part of 25, quoted above, for an annual estimate by the Director of the Mint

and a proclamation. Act of March 3, 1873, c. 268, 17 Stat. 602, Rev. Stat. §3564. In 1890 the estimate was required to be quarterly, instead of for the year. Act of October 1, 1890, c. 1244, §52, 26 Stat. 567, 624. Finally, on August 27, 1894, the statute received its present form, with the proviso from which the Secretary derives his clearest grant of power. The general purpose of this proviso undeniably is to secure a closer approximation still. In construing it we must bear this obvious purpose in mind. While no doubt the grammatical and logical scope of a proviso is confined to the subject matter of the principal clause, we cannot forget that in practice no such limit is observed, and when, as here, we are dealing with an addition made in new circumstances to a form of words adopted many years before, the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down. *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 181."

The court held (at page 146) that under the proviso the Secretary of the Treasury was authorized to order a reliquidation in order to make the value in United States currency correspond with the actual value of the goods. The court made clear (pp. 144-145) that the value of "the unit of actual cost" was the relevant rate and that "a reliquidation on the basis of the units actually used" was the proper procedure; in other words, that the actual cost per unit to the importer of the currency used in payment for the merchandise must be used in conversion of that currency.

As appears from this and other cases, the Secretary of the Treasury has recognized that the rate for the foreign exchange with which imported merchandise is purchased is the sound measure of value of the foreign currency to be used in the computation of dutiable values

in dollars for customs purposes, and that the use of such rates produces values in United States currency which are, or most nearly approximate, the actual dollar values of the imported merchandise.

Klumpp v. *Thomas*, 162 Fed. 853 (C.C.A. 3rd 1908), cert. denied 212 U. S. 579;

J. K. Clarke v. *United States*, 17 C.C.P.A., Customs 420, T. D. 43866 (1930).

See *Brown & Roese* v. *United States*, *supra*.

As stated by the Attorney General in his brief for the United States in the *Whitridge* case (at page 136):

> "The policy of the Government as to *ad valorem* duties is to assess at actual cost or market value . . ."

In 1921, following the violent fluctuations in foreign exchange rates which had occurred after the first World War, the proviso of the 1894 Act granting authority to the Secretary of the Treasury to determine foreign exchange rates for use on reliquidations was superseded by the amendment (c. 14, sec. 403 (b) and (c)) now constituting, with an amendment not pertinent here, paragraphs (b) and (c) of section 522. The provision for Presidential regulations under which consuls certified values of foreign currencies, and the provision establishing the "par of exchange" for the pound sterling, were repealed at the same time. (See Notes 12, 13 and 14, *supra*) The Committee on Finance of the United States Senate, in reporting to the Senate section 403 of the 1921 Tariff Act stated[17] that the new provisions were in lieu of reliance on consular certificates which had proven unsatisfactory because of

[17] Senate Report No. 16, 67th Cong., 1st Sess., p. 16 (1921).

their frequent omission from shipping papers.[18] The purpose of the changes made in 1921 is summarized in *Fry & Friedsam v. United States*, 12 Ct. Cust. App. 486, T. D. 40634 (1925).

The court in that case stated (at page 489):

> "It will be observed that section 403 of the emergency tariff act of May 27, 1921, purports to be, and is, a complete revision of said section 25; that said section 25 is repeated without material

[18] In the same year as the 1921 amendment, which first enacted provisions now contained in section 522, Congress enacted the Anti-dumping Act of 1921 (42 Stat. 11, 19 U.S.C. §160-171). Later it enacted the countervailing duty provisions of sections 303 of the Tariff Acts of 1922 (42 Stat. 935) and 1930 (19 U.S.C. §1303), which superseded the somewhat similar provisions of earlier Acts. Section 303 provided for the imposition of additional duties equal to any bounty or grant upon the manufacture or production of any merchandise in, or export of any merchandise from, any foreign country. The manifest purpose of these statutes is to provide means for counteracting foreign price cutting for export (i.e., dumping) and grants or bounties by a foreign country, whether caused by foreign manipulation of foreign exchange rates or otherwise.

F. W. Woolworth v. United States, 115 Fed. (2d) 348, 28 C.C.P.A. (Customs) 239 (1940).

Presumably the same purpose is reflected in the requirement of the Tariff Acts that the higher of (1) the market value of imported merchandise for home consumption in the country of exportation (its foreign value) and (2) its market value for exportation to the United States (its export value), shall be the dutiable value. Section 402(a), (1), (c) and (d) of the Tariff Act of 1930, 46 Stat. 708 and 709, 19 U.S.C. §1402(a), (1), (c) and (d). It is clear, therefore, that in enacting section 522(c) Congress did not intend an abandonment of its established policy for ascertaining the true dollar values of imported merchandise and did not intend that any foreign manipulation should be compensated for by reciprocal manipulation by the Federal Reserve Bank of New York of a rate of foreign exchange certified under section 522(c).

V. Mueller & Co. v. United States, 115 Fed. (2d) 354 (C.C.P.A. (Customs and Patent Appeals, 1940);

Nicholas & Co. v. United States, 249 U.S. 34 (1919);

International Forwarding Co., Inc. v. United States, Vol. 76, No. 43, Treas. Dec. 55 (Customs Ct. 3rd Div. Apr. Term, 1941).

change until that portion of said section is reached in and by which a method is provided for ascertaining foreign exchange values. That portion of said section is omitted from section 403 of the act of May 27, 1921, and is therefore repealed. In lieu of the method provided by said section 25, a new method of ascertainment of the value of foreign currency is provided, namely, a determination by the Federal Reserve Bank of New York, which shall be certified daily to the Secretary of the Treasury, and which said valuation as to any importation shall be effective at noon on the day of exportation.

"It is evident this change in our method of fixing foreign currency values was brought about by the violent fluctuations in the values of foreign currency during the period immediately following the World War, and which existed at the time of the enactment of said emergency tariff act of 1921. By said section 25, cumbersome and slowly moving machinery was provided by which, on special occasions, and upon the production of 'satisfactory evidence', the Secretary of the Treasury might ascertain and fix a different exchange value from that proclaimed by him for the quarter. By said section 403, for purposes of celerity and dispatch, a departure from the proclaimed exchange rate may be had when 'the value so proclaimed varies by 5 per centum or more', a fact which obviously must be found in the first instance by the collector."

The provisions thus enacted, which were reenacted without substantial change in section 522(c) of the Tariff Act of 1930, show explicitly the purpose and intent of Congress to ascertain more accurately than had been done under the earlier statutes the true dollar values of imported merchandise by use of the market rate of the foreign exchange with which the merchandise was purchased. This purpose and intent make it clear that the Federal Reserve Bank of New York is authorized to certify the rates of

foreign exchange necessary or appropriate for the determination of the true dollar values of imported merchandise. This in turn necessarily involves a certification of more than one rate for currency of a single foreign country when, by reason of the relatively new foreign exchange control laws and regulations of such country, different rates exist in the New York market for cable transfers payable in the currency of such country, and different types of merchandise imported into the United States from such country are paid for by means of such cable transfers purchased at such different rates.

B. *That section 522(c) authorizes the certification of rates of exchange the use of which will produce, or most nearly approximate, the actual dollar values of the imported merchandise, is the only interpretation of that section consistent with the fundamental principles upon which the tariff acts have always been based.*

The ascertainment of the true market value in dollars of the imported merchandise is the same purpose which underlies the determination of values under the general tariff statutes. Those statutes provide for the ascertainment of the dutiable value of imported merchandise from market values and offering prices and, when those cannot be satisfactorily ascertained, from the cost of production, and they also provide for a true statement in the invoice of the purchase price of the merchandise.

See sections 402 and 481 of the Tariff Act of 1930, 19 U.S.C. §§1402, 1481;

Act of July 31, 1789, *supra*, Note 6.[19]

[19] This early Act provided that "invoices of all importations shall be made out in the currency of the place or country, from whence the importation shall be made, and not otherwise" (sec. 18, 1 Stat. 41).

The principle of ascertaining the true market value in dollars of imported merchandise, by the use of the rate for foreign exchange with which the price of the merchandise is payable, applies to one of several rates for the currency or currencies of a single country just as it applies to one of several rates each of which is for the currency of a different country. An obvious analogy exists where the different currencies of several countries have a common designation, such as "pounds". In such a case, different rates are used to give the different market values, dependent upon whether the imported merchandise was purchased with British, Australian or other type of pounds in Great Britain, Australia or other country, respectively. Even if the importations came from the same country, the rate of exchange for the currency with which the respective importation was usually purchased would be required to ascertain the true dollar value.[20]

Isham v. *United States*, 44 Treas. Dec. 411 (Bd. of Gen. Appraisers, 1923).

It follows that for the purpose of section 522(c) it is immaterial whether different rates for each of two or more currencies, or two or more rates for a single currency, are involved.

C. The fact that section 522(c) uses the words "the rate" instead of the words "the rate or rates" does not defeat the purpose of the statute.

It is an established rule of statutory construction, referred to in the opinion of the United States Customs

[20] The Treasury Department recognizes "that two or more currencies of different character may circulate" in a foreign country, and has provided for the use of the foreign exchange rate for each currency; the rate used for conversion being the rate for "the currency in which identical or similar merchandise is usually bought and sold in the ordinary course of trade . . ." Article 776(b) and (e), Customs Regulations of 1937 as amended October 10, 1940 by T.D. 50251 (i) and (j).

Court, that, if it is necessary in order to carry out the purpose and intent of the legislative body, (1) a term used in a statute in the singular will be interpreted as both singular and plural, and (2) the statute will be so interpreted as to extend to new situations which the drafters did not specifically foresee.

Rev. Stat. §1 (1 U.S.C. §1);[21]

United States v. *Oregon and California R.R. Co.* 164 U. S. 526, at page 541 (1896);

In re Eikel, 283 Fed. 285 at page 289, (D.C., Tex. 1922) rev. on other grounds, 285 Fed. 732 (C.C.A. 5th 1922), cert. denied 262 U. S. 754;

Portland v. *New England Tel. & Tel. Co.* 103 Me. 240, 68 Atl. 1040 at page 1043 (1907).

The relevant portion of section 1 of the United States Revised Statutes, *supra*, as contained in the United States Code, reads as follows:

> "Section 1. In determining the meaning of any Act or resolution of Congress passed subsequent to February 25, 1871, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; * * * unless the context shows that such words were intended to be used in a more limited sense * * *."

This provision of the Revised Statutes was cited in the recent case of *Twin City Milk Producers Ass'n.* v. *McNutt*, 122 Fed. (2d) 564 (C.C.A., 8th, 1941). There a statute authorized the Federal Security Administrator to "promulgate regulations fixing and establishing for any

[21] This section was derived from Act of February 25, 1871, c. LXXI, sec. 2, 16 Stat. 431, and was incorporated into the Revised Statutes in 1873.

food, under its common or usual name as far as practicable," a definition and standard of identity and other standards. The Administrator's regulation dealt with "Dried Skim Milk, Powdered Skim Milk, Skim Milk Powder" collectively. The Court wrote (at page 568):

> "It is claimed that the adoption of three designations, 'dried skim milk', 'powdered skim milk', and 'skim milk powder', was not a compliance with the provisions of the Act requiring the use of the 'common or usual name'. * * * Where several common or usual names for a food product are found to be in general ultimate consumer use, a reasonable construction of the Act does not require that the Administrator be prohibited from adopting more than one term or designation in promulgating an appropriate regulation to promote honesty and fair dealing in the interest of consumers. Nor is such a strict singular construction of the term 'common or usual name' required per se, in view of the general congressional declaration in 1 U.S.C.A. §1, that 'In determining the meaning of any Act or resolution of Congress, passed subsequent to February 25, 1871, words importing the singular number may extend and be applied to several persons or things.'"

Even though Congress may not have actually contemplated the application of section 403(e) of the Emergency Tariff Act of 1921 (reenacted in substance as section 522(e) of the Tariff Act of 1930) to situations involving two or more rates in the New York market for foreign exchange payable in the currency of a single foreign country, the provisions of the section properly construed authorize the certification of different buying rates for different classifications of foreign exchange payable in such currency when at any time after the enactment of the statute the exchange control laws of such foreign country create different classifications of such foreign exchange, based on

different derivations and permitted uses thereof, and different rates actually exist in the New York market for such different classifications. In *Hurley* v. *Inhabitants of South Thomaston*, 105 Me. 301, 74 Atl. 734 at page 736 (1909), the court sets forth the rule:

> ". . . as stated in Endlich on the Interpretation of Statutes, §112, 'The language of the statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it.'"

These rules of statutory construction for the inclusion of cases not within the exact letter of a statute involve the same basic principle of law as the rule which excludes cases within the literal terms, but outside the intent, of a statute.

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."
>
> *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, at page 459 (1892)

The general principle may be stated to be:

> "The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress . . . And unjust or absurd consequences are, if possible to be avoided."
>
> *Fleischmann Construction Co.* v. *United States*, 270 U. S. 349, at page 360 (1926);
>
> *See Haggar Co.* v. *Helvering*, 308 U. S. 389, at page 394 (1940)

In interpreting the statute "the practical purpose of the statute" and the "legislative plan" should be taken into consideration.

Royal Indemnity Co. v. *American Bond & Mortgage Co.*, 289 U. S. 165, at page 169 (1933);

United States v. *Katz*, 271 U. S. 354, at page 357 (1926)

In the light of the purpose and intent of Congress and the "legislative plan" in enacting the provisions of section 522 (c), it would seem difficult to conceive of a clearer situation for the application of these rules than in the interpretation of section 522(c) under the conditions existing with respect to the pound sterling on May 3, 1940.

A similar question of interpretation arose under the 1894 amendment (Act of August 27, 1894 c. 349, sec. 25, 28 Stat. 552) to the then existing statutes. That amendment was the immediate predecessor of the present provisions of section 522(c) of the Tariff Act of 1930. (*Supra*, Note 13.) The amendment conferred upon the Secretary of the Treasury authority to use, for conversion of foreign currencies for customs purposes, a different value than the proclaimed metallic value. This Court, in *United States* v. *Whitridge*, *supra*, (at page 142), in order to effect the general purpose and intent of Congress with respect to situations not specifically contemplated at the time of the enactment of the amendment, interpreted it as authorizing the Secretary of the Treasury to determine and use the current foreign exchange rate for an appreciated or depreciated foreign currency, contrary to the grammatical and logical scope of the amendment which was confined to metallic values of foreign coin.

This Court will take judicial notice of the fact that since the enactment in 1921 of the provisions now con-

tained in section 522(c) chaotic conditions have affected the currencies and foreign exchanges of the world. Foreign laws, decrees and regulations of one kind or another have imposed controls or restrictions on foreign exchange and export transactions in the light of which the duties of the Federal Reserve Bank of New York under the statute must be construed. It is a matter of common knowledge, and continuous public comment and discussion, that most of the countries of the world are not now, and have not been for some years past, on the gold standard; that many countries now have, and have had for a number of years, measures for the control and restriction of foreign exchange and export transactions; and that these measures have resulted in different rates for foreign exchange payable in the currency of a single foreign country, varying with the derivation and use of the particular exchange. Reference to public documents of the Government, of which this Court will take judicial notice, shows that exchange control measures have been in effect a number of years.

> House Document No. 15, 76th Congress, 1st Session, Twenty-second Annual Report of the United States Tariff Commission (1938), pursuant to section 332 of the Act of Congress approved June 17, 1930 (46 Stat. 698), p. 1.
>
> "Regulation of Tariffs in Foreign Countries by Administrative Action", United States Tariff Commission, Report to Committee on Ways and Means, House of Representatives (1934), pp. 1-2, 5-6.[22]

That this Court will take judicial notice of the contents

[22] Excerpts from these public documents containing references to exchange control measures in Great Britain and elsewhere, are set forth in the Appendix (pp. vii-viii). See Southard, *supra*, Note 2, pp. 188-189, Appendix, pp. v-vi; and Mordecai, *supra*, Note 4, p. 374, Appendix, p. vi.

of public documents and reports of Commissions made to Congress is well settled.

> *Arizona* v. *California*, 283 U.S. 423, at pages 453-4 (1931).

With respect to facts of public notoriety pertaining to values of foreign currencies, this Court at an early date took judicial notice of the "intrinsic value of the pound sterling, as represented by the gold coins of England", (*The Collector* v. *Richards*, 23 Wall. 246, at page 258 (1874)); and in *United States* v. *Whitridge*, *supra*, stated (at page 145):

> "It was objected that some of the facts which we have mentioned were not proved in the case, but they are public facts, and when we are asked to declare that the Secretary exceeded his power we have to consider what might have been before his mind."

It is interesting to note that the interpretation of section 522(c) as authorizing the certification of more than one rate, notwithstanding the use of the singular term "rate", follows the precedent of the Treasury Department with respect to the interpretation of section 522(a). Although section 522(a) provides that "the value of foreign coin . . . shall be that of the pure metal of such coin of standard value" and that "the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury", the Secretary has, in order to meet the new conditions which

have arisen since 1921, proclaimed the values not of "foreign coins" but of "foreign monetary units".[23]

See *Amalgamated Textiles* v. *United States*, 84 Fed. (2d) 210, 24 C.C.P.A., Customs 74, T. D. 48378 (1936);

J. S. Staedtler Inc. v. *United States*, 25 C.C.P.A., Customs 136, T. D. 49255 (1937).

As early as *Cramer* v. *Arthur*, *supra* (1880) this Court accepted the interpretation by the Secretary of the Treasury of the provisions of the 1873 Act corresponding to those now contained in section 522(a), that the specific provision therein directing that "the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the Director of the Mint and proclaimed on the 1st day of January by the Secretary of the Treasury," permitted him to proclaim the value of a "standard money of account" (based on coin). This Court stated (at page 616 of the *Cramer* case) that "Whether represented by a corresponding coin of equal amount is of no consequence."

If section 522(a) did not permit such an interpretation by the Secretary of the Treasury in the circumstances of today, when there are few, if any, standard coins in circulation which represent the foreign currencies to be

[23] On October 1, 1930, (T. D. 44255), the Secretary of the Treasury changed his former practice of proclaiming "the values of pure metal contents of foreign coins", T. D. 38770, July 1, 1921, to proclaiming "the values of foreign monetary units". A similar change in the subtitle of Treasury Circulars was made on July 1, 1932 (T. D. 45775), and the former subtitle of "VALUES OF FOREIGN MONEYS" was changed to read "VALUES OF FOREIGN MONETARY UNITS (at par as regards gold units; non-gold units have no fixed par with gold)". The practice of the Treasury Department in proclaiming other than metallic values has continued without interruption at least from April 1, 1930 to the present time. T. D. 42618, e. g. T. D. 44117, T. D. 48552, T. D. 50125, T. D. 50544.

valued, paragraph (a) of section 522 would be a nullity, or largely a nullity. Without a similarly broad interpretation of section 522(c) in the light of conditions which have arisen since 1921, the purpose of that section cannot be accomplished.

POINT II

Upon the facts in this case the Federal Reserve Bank of New York was authorized by section 522(c) of the Tariff Act of 1930 to determine and certify to the Secretary of the Treasury two rates for pounds sterling.

It is submitted that the opinion of the United States Court of Customs and Patent Appeals misinterprets the facts relating to the control of foreign exchange in effect in Great Britain on May 3, 1940 and the nature and function of foreign exchange.

The fact is that the control, established by the Government of the United Kingdom, in respect of foreign exchange payable in pounds sterling (including cable transfers) resulted in transactions in such foreign exchange in the New York market at two different basic rates.[24] Because of the laws of Great Britain, foreign exchange payable in pounds sterling could be purchased on May 3, 1940 in the New York market not only at the "Official" rate but also at the "Free" rate (R. 68-69, 73-74). The so-called "Official" rate was the rate fixed by the British authorities. It was the dollar price per pound sterling at which foreign exchange, payable in pounds sterling deliverable only by the Bank of England or its agents authorized for the purpose, could be purchased in the New York market. (See Exh. 1 to 5 inclusive, R. 92-128, offered R. 41-42) The

[24] See Southard, *supra*, Note 2, pp. 76-77, Appendix, pp. iii-iv.

other rate in the New York market was the free market price per pound sterling for foreign exchange payable in pounds sterling deliverable by a bank, or other holder, in Great Britain whether or not an "authorized agent". The appellation "Official" is merely a term in general use to distinguish that rate from the "Free" rate. In the case of either rate, the exchange purchased in New York was an order to a bank or other holder in Great Britain to pay pounds sterling to or upon the order of the British exporter, and the pounds proceeds of such exchange in the form of credits in Great Britain, or in the form of actual pounds sterling currency (i.e. paper or coin currency), were so paid in Great Britain in payment of the sales price of the exported merchandise (R. 66-67, 73-74).[25]

Foreign exchange so purchased on the free market could be used in making payment of the purchase price of all exports from Great Britain to the United States except five specified categories of merchandise. Foreign exchange so purchased on the New York market at the higher "Official" rate (or United States dollars) was required to be used in making payment for any of these five specified categories.

The Court of Customs and Patent Appeals referred to the "Official" rate as "*the all-inclusive* buying rate of pounds". However, under the British regulations in effect on May 3, 1940, all the unspecified categories of merchandise (including the merchandise in the case before the Court) were purchasable with pounds sterling acquired at the "Free" rate; and, so long as this was permitted under the regulations, such merchandise as a practical matter undoubtedly was paid for with pounds purchased at the "Free" rate (or with United States dollars) since the "Free" rate was the lower rate. Only if there was an

[25] See Southard, *supra*, Note 2, pp. 76-77, 188-189, Appendix pp. iii-vi.

inadequate supply of pounds sterling exchange available at the "Free" rate would pounds sterling exchange be bought in the New York market at the "Official" rate to pay for such merchandise; and the fact that on May 3, 1940, the "Free" rate was approximately 56 cents below the "Official" rate of $4.035 would indicate that an adequate supply of pounds sterling exchange was, in fact, available at the "Free" rate. Therefore, the only meaning consistent with the facts that can be ascribed to the reference by the Court of Customs and Patent Appeals to the "Official" rate as "*the all-inclusive* buying rate of pounds" is that it may be theoretically possible for an importer to have used pounds sterling, purchased at the higher "Official" rate, in making payment for merchandise exported to the United States notwithstanding that such merchandise was lawfully and freely purchasable by means of exchange acquired at a lower rate,[26] just as it is theo-

[26] Even in this sense there is in the New York market no "all-inclusive" buying rate for foreign exchange payable in the currency of certain foreign countries (including Argentina, Brazil, Chile, and Uruguay) with respect to which dual or multiple rates exist. For example the foreign exchange control laws and regulations of Brazil require that, in connection with every export into the United States from Brazil, there shall be surrendered to the exchange control authorities in Brazil, in the form of sight draft drawn on New York payable in United States dollars (or any acceptable exchange payable in other than Brazilian currency), a prescribed portion of the value of the export, against receipt of Brazilian milreis (since October, 1942, "cruzeros") at a prescribed "Official" rate. The balance of such dollar (or other acceptable) exchange may be sold in the open market in Brazil at a "Free" rate. ("COMMERCE REPORTS Weekly Containing Foreign Trade News", Bureau of For. and Dom. Commerce, U. S. Dept. of Commerce, April 15, 1939, No. 15, page 346; the relevant excerpt is set forth in the Appendix p. ix; see also Appendix p. viii) The United States importer is therefore required to pay in Brazil the purchase price of the imported merchandise in United States dollars in the form of exchange payable in United States dollars (or with other acceptable exchange). Hence, the United States importer cannot in any case use the foreign currency, or credits in the foreign currency, purchased in the form of foreign exchange in New York, in payment for his imported merchandise.

retically possible for a buyer, if he is foolish enough to do so, to pay $2 or more for merchandise freely offered at $1. The theoretical possibility of such an unrealistic payment has no direct or indirect bearing upon market values.

Similarly, if it be conceded that "anything in Great Britain could be purchased" with actual pounds sterling currency (as distinguished from bank deposits or other credits) constituting the proceeds of foreign exchange purchased at the "Official" rate, that fact is entirely irrelevant in the interpretation of section 522(c) in view of the fact that all categories of merchandise, except the five specified categories, could be purchased for export from Great Britain to the United States by means of pound sterling exchange, or actual currency constituting the proceeds of such foreign exchange, purchased at the lower "Free" rate.

If, as stated by the Court of Customs and Patent Appeals, there is only "one standard of currency in Great Britain", this is so only with respect to actual currency (paper currency and coins). (R. 75) This is entirely immaterial. Section 522(c) deals essentially with orders in the form of cable transfers pertaining to foreign currency credits. It is the different attributes and prices of such orders and credits that are material to section 522(c), not the attributes and prices of actual foreign paper currency and coins. Moreover, neither the "Free" rate nor the "Official" rate of foreign exchange payable in pounds sterling has anything to do with pounds sterling paper or coin currency available outside of Great Britain.[27] Those rates are for orders given by cable with respect to pounds sterling credits and are based upon a mere right or privilege which a bank or another has outside of Great

[27] Southard, *supra*, Note 2, pp. 76-79, Appendix pp. iii-iv.

Britain to direct a bank or other party within Great Britain to pay or credit pounds to, or upon the order of, another (the British exporter).[28]

If it were held that there is only one standard of currency in Great Britain, that would not militate against the fact that there are nevertheless several measures of the value of such currency. It is the value of orders from New York to Great Britain in the form of foreign exchange that is prescribed in section 522(c) as a measure of the value for the assessment and collection of customs duties. In fact section 522 expressly provides two separate and different measures of value of the pound sterling for use, pursuant to the section, in the assessment and collection of import duties, namely, the pure metal value (mint par) in section 522(a), and the foreign exchange rate in section 522(c); the two values to be used alternatively, the former when the difference in the two values is less than 5% and the latter when the difference is 5% or more. Ever since the 1799 Act, these two different measures of value—the value of the metal content of the foreign coin, and the depreciated value of the currency measured by the rate for foreign exchange payable in such currency — have been used in the computation of dutiable values in dollars. Foreign currency has other measures of value, though none of them are relevant in the interpretation of section 522. The courts have recognized that there are always at least three separate values, or measures of value, of every foreign currency, namely, (1) the value of the pure metal, of the standard coin of the currency, as required by the law of the foreign country (the mint par or statutory content); (2) the value of the pure metal of the average standard coin in circulation (the statutory content having been diminished by abrasion, see *The Collector* v. *Richards*, *supra*); and (3)

[28] See Southard, *supra*, Note 2, p. 86, Appendix p. v.

the foreign exchange value. Under particular conditions there might well be several other values in United States currency for a single foreign currency. Thus there might be one value when stated in United States gold and another when stated in United States silver (*Hadden* v. *Merritt*, 115 U. S. 25 at page 26) (1885) or in United States paper currency, or different values of a single foreign currency determined from its mint par based on gold, its mint par based on silver, or its paper currency (*United States* v. *Klingenberg*, 153 U. S. 93 (1894); *United States* v. *Whitridge*, *supra*).

The effects of the laws of supply and demand, and other factors,[29] which are always present, now far outweigh if they do not actually eliminate any effect on the rates of foreign exchange caused by the metal value of foreign coins. It is true that when a currency is freely redeemable in gold and there are no restrictions upon foreign exchange or the shipment of gold, the rate of foreign exchange is largely based upon the gold content of the coins. However, the court will take judicial notice of the fact that such conditions of free redemption and transfer exist nowhere in the world today, nor did they in 1940.

It does not appear from the facts in this case, or otherwise, that the certification of two rates for pounds sterling, or the certification of such number of rates as may exist at any one time in the New York market for any foreign exchange used in payment for merchandise imported into the United States from a single foreign country, would result, as the Court of Customs and Patent Appeals stated, in "confusion worse confounded". It would appear to be a completely practicable procedure to have the importer state on the invoice of the imported merchandise the rate

[29] Southard, *supra*, Note 2, pp. 35, 86, Appendix pp. ii-iii, v

paid by the importer for the foreign exchange used in making payment of the invoice price. Like the importer's statement of value, the rate used, and its applicability to the merchandise covered by the invoice, would be subject to checking by the Collector.

In *Cramer* v. *Arthur*, *supra*, this Court stated ". . . invoices, exhibiting the actual transactions, and capable of being verified by oath, are essential instrumentalities in the prevention of fraud; and, in the absence of suspicious circumstances, usually furnish the basis for estimating the actual values of the goods." (p. 618)

Such information as may be needed, in order to determine with reasonable and practicable certainty which of two or more rates certified for the currency of an invoice applies to the particular merchandise covered by the invoice, can be obtained by the Treasury Department from appropriate sources. In fact, the record shows that the Government already has its own sources of information of this character through Treasury Department, consular, and diplomatic representatives throughout the world (R. 80, 84-85).

Application of the opinion of the Court of Customs and Patent Appeals would require the use in all cases of a dollar value of foreign currency fixed by the foreign country of export at any figure, however arbitrary. Such a rate would be similar to the "Official" rate, which for most categories of merchandise imported from Great Britain in May 1940 results in a dollar value entirely unrelated to the true dollar value of the imported merchandise. This would be in principle a reversion to the fixed values of foreign currencies which the Congress has constantly striven to avoid ever since the statute of 1799 first provided a method for the more accurate valuation of depre-

ciated foreign currencies and consequently the more accurate ascertainment or approximation of market values of imported merchandise purchased therewith.

The position of the United States Court of Customs and Patent Appeals is essentially that because under present world conditions there is some degree of difficulty in ascertaining the exact dollar values of imported merchandise, or because it is impossible to ascertain them exactly in all cases, the whole effort of the Congress throughout its entire tariff history to ascertain such values, or to approximate them as nearly as practicable, should be disregarded where dual or multiple rates exist, and a single rate of exchange used although it is known that this will not result even in an approximate dollar value of many categories of imported merchandise.

The terms of section 522(c) refer to the rate in the New York market. When, as in this case, there are in fact two distinct rates in that market for the currency of a single foreign country, how can one of such rates properly be selected for certification to the exclusion of the other? A proper interpretation of the statute in such circumstances clearly depends upon the intent and purpose of Congress. As pointed out above (POINT I) the purpose and intent of the section is to determine more accurately the dollar market value of the imported merchandise. The determination of such true dollar values of merchandise imported from Great Britain in May 1940 in turn required the use of the two rates of exchange by means of which the various categories of merchandise could be respectively purchased. It follows that the certification by the Federal Reserve Bank of New York of the two rates for pounds sterling was appropriate.

Whether it be considered that (1) there were two rates

for the pound sterling, or (2) that the pound sterling, though a single currency, was so regulated by British laws as to create two classifications thereof having different attributes and values, or (3) that, because of the two rates at which foreign exchange payable in pounds sterling was purchasable, there were, for the purposes and within the meaning of section 522 of the Tariff Act, two separate and distinct pound sterling currencies, is (as shown in POINT I hereof) immaterial in carrying out the intent and purpose of that section.

In order to give effect to the purpose and function of section 522(c) in the circumstances existing on May 3, 1940, the section must be interpreted as authorizing the Federal Reserve Bank of New York to certify to the Secretary of the Treasury on that day the two rates of $4.035000 "Official" and $3.475138 "Free" for pounds sterling.

POINT III

The rate or rates for foreign exchange payable in currency of a single foreign country determined and certified by the Federal Reserve Bank of New York, pursuant to section 522(c) of the Tariff Act of 1930, are final and conclusive and not subject to judicial review.

Both parties to this case agree that a series of decisions by this Court establishes the principle of law that appropriate executive action taken in a manner which on its face conforms to the provisions of section 522 of the Tariff Act of 1930 is final and conclusive and not subject to judicial review. The Customs Court held that the statute authorized the certification of more than one rate in ap-

propriate cases and that the action of the Federal Reserve Bank of New York in determining and certifying two rates for pounds sterling pursuant to section 522(c) was final and conclusive. It also held that the action of the Secretary of the Treasury in selecting the "Official" rate to be used by Collectors of Customs in converting pound sterling costs into dollars in all cases was without effect. The Court of Customs and Patent Appeals held, on the other hand, that the action of the Secretary of the Treasury in selecting the "Official" rate was binding and conclusive, and stated in effect, by way of dictum, that the statute authorized the Federal Reserve Bank of New York to certify only one rate.

In agreeing with the Customs Court that the action of the Federal Reserve Bank of New York in determining and certifying the two rates for pounds sterling was final and conclusive and not subject to judicial review, it is not necessary to express any opinion upon the question of whether the action of the Secretary in selecting the "Official" rate for use in all cases, to the exclusion of the "Free" rate, was ineffective as held by the Customs Court, or was binding and conclusive as held by the Court of Customs and Patent Appeals.

The case of *Cramer* v. *Arthur, supra*, is the leading case establishing that rates of foreign exchange determined by an executive agency of the United States Government pursuant to Federal statute, for use in the assessment and collection of customs duties, are final and conclusive and not subject to judicial review. That case is strikingly analogous in its facts to the case at bar, and has been consistently followed. It was a suit against the Collector of the Port of New York to recover duties alleged to have been illegally exacted by reason of the Collector's refusal to liquidate the duties on the basis of the depreciated value

claimed by the plaintiff for the Austrian paper florin, the currency in which the imported merchandise had been purchased. The consular certificate attached to the invoice showed that the Austrian paper florin was depreciated and stated the depreciated value in terms of United States currency. The Collector assessed the duties on the basis of this value and the plaintiff brought suit against the Collector to recover back the duties alleged to have been overcharged. He sought to prove by extrinsic evidence that the actual value of the Austrian paper florin was less than the depreciated value certified by the consul. The Circuit Court of the United States refused to go behind the certificate of the consul and plaintiff appealed. This Court affirmed the judgment of the Circuit Court and held that the certificate of the consul as to the value of the depreciated currency was conclusive. The Court stated (at page 619):

> "In the estimation of the value of foreign moneys for the purpose of assessing duties, there must be an end to controversy somewhere. When Congress fixes the value by a general statute, parties must abide by that. When it fixes the value through the agency of official instrumentalities, devised for the purpose of making a nearer approximation to the actual state of things, they must abide by the values so ascertained. If the currency is a standard one, based on coin, the Secretary's proclamation fixes it; if it is a depreciated currency, the parties may have the benefit of a consular certificate. To go behind these and allow an examination by affidavits in every case would put the assessment of duties at sea. It would create utter confusion and uncertainty. If existing regulations are found to be insufficient, if they lead to inaccurate results, the only remedy is to apply to the President, through the Treasury Department, to change the regulations."

Accord *United States* v. *Bush & Co.*, 310 U. S. 371, 379 (1940).

Similarly it has been consistently held that the metallic value of foreign coin estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury, as provided in the tariff acts, is conclusive and binding and that evidence is not admissible to impeach the rate so determined and proclaimed.

Hadden v. *Merritt*, *supra*;

United States v. *Klingenberg*, *supra*;

Amalgamated Textiles v. *United States*, *supra*;

J. S. Staedtler, Inc. v. *United States*, *supra*;

See *Cramer* v. *Arthur*, *supra*.

The rule applies equally to two rates for the currency of a single country. In the *Klingenberg* case, the Secretary of the Treasury had proclaimed simultaneously two values for the Austrian florin—one for the gold florin and the other for the silver florin (with a notation: "Silver, the nominal standard; paper, the actual standard, the depreciation of which is measured by the gold standard".) (153 U. S. 93, at page 99)

The Federal Reserve Bank of New York became by statute the immediate successor to the United States consul in determining and certifying the rates for conversion of depreciated foreign currencies. The regulation made by the President through the Secretary of the Treasury under earlier acts (beginning with the Act of March 2, 1799, c. XXII, sec. 61, 1 Stat. 673, providing that the rates for conversion of depreciated currencies should be certified by the consul in the country in question) was superseded by

the Tariff Act of 1921 (Act of May 27, 1921, c. 14, sec. 403(a), 42 Stat. 17) which substituted the Federal Reserve Bank of New York for the consul to determine and certify to the Secretary of the Treasury the foreign exchange rates for currencies for use in the collection and assessment of customs duties.

The Federal Reserve Bank of New York was created by Act of Congress (Federal Reserve Act of December 23, 1913, ch. 6; 38 Stat. 251,); it acts under the supervision and regulations of the Board of Governors of the Federal Reserve System which is composed exclusively of officers of the United States appointed by the President by and with the advice and consent of the Senate (Federal Reserve Act, sec. 10; 12 U.S.C., §241); and it performs numerous functions of the United States Government. For example, it issues currency of the United States, including Federal Reserve Notes, which are obligations both of the bank and of the United States (Federal Reserve Act, sec. 16; 12 U.S.C., §411), and acts as depositary and fiscal agent of the United States (Federal Reserve Act, sec. 15; 12 U.S.C., §391). The function of determining and certifying rates of foreign exchange for use in the assessment and collection of customs duties is another instance where the Federal Reserve Bank is acting in performance of a governmental duty in aid of the administration by the United States Government of one of its primary executive functions, namely, the collection of customs duties.

It would seem clear that the performance of the duty imposed upon the Federal Reserve Bank of New York by section 522(c) involves the exercise of a greater, rather than a less, measure of skill, judgment and discretion than the function of the Director of the Mint, under section 522(a), in estimating the values of foreign coins which are arrived at by arithmetical computations based on the pure

metal values of such coins. This court said in *Hadden* v. *Merritt*, *supra*, as to the determination of the value of foreign coins (at page 27): " . . . the duty of ascertaining and declaring their value . . . is the performance of an executive function, requiring skill and the exercise of judgment and discretion . . . "

The terms of section 522(c) expressly permitting the Federal Reserve Bank of New York "in its discretion" to "take into consideration" collateral factors in determining the rates show that Congress knew that determination and certification of the market buying rate was not merely ascertaining and certifying a clearly established figure or one derived from a simple mathematical calculation. Congress delegated the function to the Federal Reserve Bank of New York realizing that it had the necessary technical knowledge, experience, and sources of information including its member banks and other dealers in foreign exchange, to discharge the duty imposed by the statute.

Since the Court in the case of *Cramer* v. *Arthur*, *supra*, refused to question the rate certified by the United States consul it follows that the rates certified by the Federal Reserve Bank of New York in performance of precisely the same function for precisely the same purpose, namely, the assessment and collection of customs duties, are not subject to judicial review.

CONCLUSION

The Federal Reserve Bank of New York was authorized to certify to the Secretary of the Treasury more than one rate for the currency of a foreign country in appropriate cases in which more than one such rate actually exists and its action in so doing in this case is not subject to judicial review.

Respectfully submitted,

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Attorney for Federal Reserve Bank
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Rufus J. Trimble
LYON BOSTON
of Counsel.

New York, December 6, 1944.

Appendix

Section 522, Chapter 497, Title IV of the Tariff Act of 1930, 46 Stat. 739 (31 U. S. C. A., sec. 372). This statute reads as follows:

"(a) Value of Foreign Coin Proclaimed by Secretary of Treasury.—Section 25 of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' as amended, is reenacted without change as follows:

"'Sec. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated quarterly by the Director of the Mint and be proclaimed by the Secretary of the Treasury quarterly on the 1st day of January, April, July, and October in each year.'

"(b) Proclaimed Value Basis of Conversion.—For the purpose of the assessment and collection of duties upon merchandise imported into the United States on or after the day of the enactment of this Act, wherever it is necessary to convert foreign currency into currency of the United States, such conversion, except as provided in subdivision (c), shall be made at the values proclaimed by the Secretary of the Treasury under the provisions of section 25 of such Act of August 27, 1894, as amended, for the quarter in which the merchandise was exported.

"(c) Market Rate When No Proclamation.—If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation,

conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purpose of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal Reserve Bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions, and quotations in demand or time bills of exchange."

Excerpts from:

"Foreign Exchange Practice and Policy", Frank A. Southard, Jr., McGraw-Hill Book Company, Inc., New York and London, 1940:

(page 29):

CHAPTER II

THE FUNCTIONS AND MARKETS OF FOREIGN EXCHANGE

* * * * *

(page 35):

The Foreign Exchange Market

"Foreign exchange is bought and sold by a diversity of persons and institutions in a nation-wide 'open' or 'over-the-counter' market. If gov-

ernments leave foreign exchange trading in private hands the transactions ordinarily converge upon the principal financial centers and will be carried on chiefly by the large international banks. When foreign exchange is a government monopoly the market immediately becomes highly centralized, although as a result of the restrictions bootleg or illegal trading frequently develops. In the United States foreign exchange trading is not materially regulated by the government. Consequently the market is 'free' in that supply and demand are virtually unrestricted in the determination of exchange rates.

"The rate-making forces are the subject of the next chapter. It is necessary here to call attention to the rather obvious fact that in the United States there is at all times both a demand for foreign exchange and a supply of foreign exchange. * * *"

(page 36):

"In the United States, New York City is the principal center of foreign exchange operations. * * *"

(page 75):

CHAPTER III

FOREIGN EXCHANGE RATES

* * * * *

(pages 76-77):

Foreign Exchange Rates Described

"*Exchange Rates as Prices.*—Foreign exchange rates may be defined as prices at which foreign exchange is bought and sold. They are the prices which indicate how many dollars an American importer will have to pay his bank for a £1,500

sight draft to settle his account in England; or the number of dollars an American cotton exporter will receive for the 200,000-franc draft he has drawn on his French customer. Just as is the case with commodity prices, foreign exchange rates are to varying degrees competitively determined—or, more accurately, competition in the determination of foreign exchange rates approximates 'perfection', as conceived by the Marshallian economist, in varying degrees. The pound sterling-dollar rate is highly competitive, although among the supply or demand factors will appear, from time to time, the exchange stabilization funds of the two countries concerned. At the other extreme, a government may monopolize the supply of foreign exchange and more or less arbitrarily fix the price at which it will be sold or allotted to buyers.

"*Typical Quotations.*—* * *

"In the first place the discussion in Chap. II should be recalled to remind us that the foreign exchange market is more closely akin to the over-the-counter securities market than it is to such an organized trading place as the New York Stock Exchange. * * *"

(page 79):

"In the second place, all these rates quoted in the New York market are for foreign exchange and not for actual currency. It is obvious that in the United States the market problem is that of agreeing on prices in *dollars* at which *foreign exchange* may be bought or sold. Sterling, franc, yen, lira rates are quoted in our foreign exchange markets; while in foreign countries dollar and other exchanges will be dealt in. * * *"

Appendix

(page 86):

Determination of Exchange Rates

"Thus far the chapter has been concerned with the structure of foreign exchange rates. It has been asserted that the basic rate is that for cables and that on this rate the demand and time rates are built. How, then, are the rates for cables and for closely related demand or sight exchange determined? The answer is that from day to day they are set by the interaction of the supply of exchange and the demand for exchange, but underlying these continually shifting daily rates are the fundamental forces which give rise to and govern supply and demand in the foreign exchange market. * * *"

(pages 188-189):

"*Dual and Multiple Exchange Rates and Exchange Rationing.*—There have been many instances in monetary history where, with the foreign exchange value of a country's currency pegged at an overvalued rate, illegal trading has given rise to one or more so-called 'black' rates. This has happened frequently, for example, in Soviet Russia. In such countries there are, *de facto*, dual or multiple exchange rates, but one cannot consider them dual-rate foreign exchange *policies* so long as the unofficial trading is illegal.

"Recent years, however, have seen the development of clearly expressed foreign exchange policies by which countries maintain an *official* foreign exchange rate—or, often, both an official buying and an official selling rate—and one or more 'discount' rates at which the home currency is quoted at some degree of depreciation from the official rate or rates. Where, as in Argentina, Chile, or Brazil, only two rates are legally recognized, an official rate and a free-market rate, it is convenient to speak of a dual-rate policy. When, as in Germany,

a number of discount rates are legally recognized along with *the* official (or least depreciated) rate, the foreign exchange policy is one of multiple rates. * * *"

Excerpts from:

"Commercial Pan America—A Monthly Review of Commerce and Finance", Volume X, Nos. 9 and 10, September and October, 1941, Ezekiel Mordecai (page 374):

"The term 'exchange control' is used generally to describe those various systems by which governments regulate the volume of transactions at an official rate of exchange. Techniques used in the southern countries imposing exchange control vary widely and are usually accompanied by direct controls of exports and imports. In general, exchange control, as it operates in the thirteen countries (in the Americas) where it is in effect is neither so complex nor so severe as similar systems in Europe. A 'free market' is usually permitted where exporters may sell a certain portion of their proceeds from foreign sales at rates higher than official rates. Exchange may be obtained on the 'free market' for transactions not authorized at the lower official rates . . . Not only do the exchange control systems of the various countries where such are in force differ widely, but policies within each country change with bewildering rapidity."

It will be noted that the "free market" here referred to is the exporter's market for his dollar exchange. In the case of a British exporter, he would normally receive more pounds sterling per dollar than at the "Official" rate, i.e., the dollar price of the pound in the "Free" market is lower than the "Official" rate.

Appendix

Excerpt from House Document No. 15, 76th Congress, 1st Session, Twenty-second Annual Report of the United States Tariff Commission (1938) Pursuant to section 332 of the Act of Congress Approved June 17, 1930 (46 Stat. 698).

On page 1 of the "Introduction and Summary", after mentioning the British Protective Tariff of 1932, the report states:

> "In Germany and other central European countries, in southern and eastern Europe, and in Latin America, licensing systems, exchange controls, clearing and compensation agreements followed in rapid succession. * * * All of these developments have affected the foreign trade of the United States."

Excerpts from "Regulation of Tariffs in Foreign Countries by Administrative Action", United States Tariff Commission Report to Committee on Ways and Means, House of Representatives (1934).

On pages 1 and 2 of the "Introduction" the report states:

> "Restrictive measures other than tariffs
>
> In addition to tariff duties import trade has been restricted or controlled by other measures, such as import quotas or prohibitions; import restrictions with or without a system of licenses; import monopolies; foreign exchange control; milling or mixing regulations; and increased fees and restrictive regulations of various kinds. Import quotas and exchange control measures may be even more restrictive trade barriers than tariff rates. * * *
>
> Restrictions on foreign exchange transactions are applied in many countries, almost necessarily by the Executive. In several European and Latin American countries control of foreign-exchange

transactions is officially exercised through the central banking system. Among the countries applying restrictions for control of foreign exchange are:

Argentina	Czechoslovakia	Latvia
Austria	Denmark	Norway
Bolivia	Ecuador	Paraguay
Brazil	Estonia	Spain
Bulgaria	Greece	Turkey
Chile	Germany	Uruguay
Colombia	Hungary	Yugoslavia
Costa Rica	Italy	

The section under the heading "Brazil", on pages 5 and 6 of the report, reads as follows:

"BRAZIL

"The Executive of the post-revolutionary government specifically assumed power over the tariff under decree no. 20,280 of September 8, 1931. Since then the executive of this government by decree has exercised the following functions with respect to the tariff: (1) Establishment of 'minimum' and general rates; (2) changes in the method of applying the existing tariff in such a way as to affect rates; (3) changes in individual classifications and rates; (4) negotiation, conclusion, and enforcement of a limited number of commercial agreements so as to affect a few individual rates; (5) prohibitions and licensing affecting the importation of a limited number of articles; (6) preparation of a complete tariff revision (promulgated June 11, to be put into effect September 1, 1934).

"Foreign exchange restrictions affecting imports have been in effect in Brazil since September 1931.

"Quota restrictions have not been imposed on imports into Brazil up to the present."

Appendix

Excerpts from:

"COMMERCE REPORTS — Weekly Containing Foreign Trade News", Bureau of Foreign and Domestic Commerce, United States Department of Commerce, April 15, 1939, No. 15 (page 346):

"BRAZIL—*New Exchange Regulations.*

"On April 8 the President of Brazil signed decree law No. 1201, effective April 10, establishing new exchange regulations, according to a cable received from the American Embassy at Rio de Janeiro. With a few variations, the new system appears to provide for payment of imports in about the same manner as the previous system which prevailed from February 1935 to November 1937.

"The text of the new decree law is as follows:

"Article 1.—Freedom of exchange operations is reestabliished within the terms of the present decree law.

"Article 2.—Export drafts, as well as values transferred from abroad, will be sold freely to banks established in this country that are authorized to conduct exchange operations.

"The bank control will supply export permits only upon presentation of proof by the exporter showing that the respective exchange has been sold in accordance with the terms of this decree law.

"Article 3.—Banks purchasing export drafts are obliged to sell to the bank of Brazil, in sight drafts on London or New York, in accordance with the official rate established daily, and in money of international acceptance, 30 percent of the amount of each bill of exchange purchased.

" . . . "

SUPREME COURT OF THE UNITED STATES.

No. 287.—October Term, 1944.

John Barr, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Court of Customs and Patent Appeals.

[February 5, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

The question in this case is the proper rate at which the currency of the invoice of imported goods should be converted into United States dollars under § 522(c) of the Tariff Act of 1930. 46 Stat. 739, 31 U. S. C. § 372(c).

On May 13, 1940, petitioner imported into the United States at the port of New York certain woolen fabrics which had been exported from England on May 3, 1940. Payment for the merchandise was made with pounds sterling purchased through the Guaranty Trust Co. of New York in the New York market for cable transfer. The Collector of Customs converted the pounds sterling of the invoice into dollars at the "official" rate of exchange of $4.035. Petitioner claimed that the currency of his invoice should have been converted at the "free" rate of exchange of $3.475138. He paid the higher rate and filed his protest against the Collector's action under § 514 of the Tariff Act of 1930. The Customs Court sustained the protest. 79 Treas. Dec., No. 7, 14. The Court of Customs and Patent Appeals reversed. 143 F. 2d 132. The case is here on a petition for a writ of certiorari which we granted because of the importance of the questions presented.

The "free" rate and the "official" rate have the following origin.

Sec. 522(a) of the Tariff Act provides that the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value, and that it shall be estimated quarterly by the Director of the Mint and proclaimed by the Secretary of the Treasury. The value of the pound sterling at all times relevant here was proclaimed to be $4.2397. Sec. 522(b) provides that for the purpose of assessment and collection of duties upon merchandise imported into the United States foreign currency shall be converted, wherever necessary, into currency of the United States at the values proclaimed by the

Secretary under § 522(a) for the quarter in which the merchandise was exported. Sec. 522(b) provides, however, for an exception. That exception is contained in § 522(c) which reads as follows:

> "If no such value has been proclaimed, or if the value so proclaimed varies by 5 per centum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. If the date of exportation falls upon a Sunday or holiday, then the buying rate at noon on the last preceding business day shall be used. For the purposes of this subdivision such buying rate shall be the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary. In ascertaining such buying rate such Federal reserve bank may in its discretion (1) take into consideration the last ascertainable transactions and quotations, whether direct or through exchange of other currencies, and (2) if there is no market buying rate for such cable transfers, calculate such rate from actual transactions and quotations in demand or time bills of exchange."

At all times prior to March 25, 1940, the Federal Reserve Bank of New York pursuant to its authority under § 522(c) certified daily to the Secretary of the Treasury one buying rate for the pound sterling. When the present war between Great Britain and Germany was declared, the British Government inaugurated a detailed system for controlling foreign exchange. It required among other things that all persons resident in the United Kingdom sell to the British Treasury at prices fixed by it all foreign currency which they were entitled to sell, and prohibited, with certain exceptions, exportation of foreign currency from the United Kingdom and the purchase and sale of foreign currency in the United Kingdom from or to any person other than an authorized dealer and at prices fixed by the British Treasury. On March 7, 1940, an Order in Council, effective March 25, 1940, was issued by the British Government which provided that certain classes of merchandise[1] (whiskey, furs, tin, rubber and jute) might not be exported from the United Kingdom to the United States and certain other countries except when payment had been or would be made to persons resident in the United Kingdom in specified currencies. These currencies included United States dollars or English pounds

[1] Subsequent to the exportation of the merchandise involved in the present case this Order was amended, effective June 10, 1940, to include goods of any class or description.

purchased in the United Kingdom after September 3, 1939, from an authorized dealer in foreign currency. Authorized dealers sold English pounds only at the rate of $4.035, prescribed by the British Treasury, from January 8, 1940, to September 30, 1942, when the present case was tried.

On March 19, 1940, the Federal Reserve Bank of New York notified the Secretary that because of the order of the British Government of March 7, 1940, it would certify, beginning March 25, 1940, two rates for the pound sterling—one to be designated as the "free" rate, the other as the "official" rate. The latter was the rate fixed by the British Treasury. On April 15, 1940, the Secretary of the Treasury notified the collectors of customs that until further notice he would publish only the "official" rate; and he directed them to use that rate for assessing and collecting duties on imported merchandise whenever it varied by more than 5 per cent from the value of the pound proclaimed by the Secretary under § 522(a) of the Act.[2] T. D. 50134, 75 Treas. Dec. 370, 371, 5 Fed. Reg. 1447.

On the date petitioner exported his merchandise from England, the Federal Reserve Bank of New York certified to the Secretary of the Treasury that at noon on that day the "free" rate for the English pound was $3.475138 and the "official" rate was $4.035. The Secretary, in accordance with his notification of April 15, 1940, to the collectors of customs published only the "official" rate. T. D. 50146, 75 Treas. Dec. 388. Since the "official" rate varied by more than 5 per cent from the proclaimed value of the pound for that quarter, the collector used the "official" rate in converting pounds into dollars for the purpose of assessing and collecting duties upon the value of the woolen fabrics. The pounds sterling which petitioner used in the purchase of the woolens were not obtained from an authorized dealer as defined in the British order of March 7, 1940, but, as we have noted, through the Guaranty Trust Co. of New York in the New York market for cable transfer. Petitioner claims that the invoice currency should have been converted at the "free" rate of $3.475138 as determined and certified by the Federal Reserve Bank of New York for the date of this exportation.

It was noted in *United States* v. *Whitridge*, 197 U. S. 135, 142, that the assessment of an *ad valorem* tax on imports involved an ascertainment of the true value of the article taxed as of the date of the tax and that the invoice price was an approximate measure-

[2] As we have noted the value of the pound sterling at all times pertinent to this case was proclaimed to be $8.2397.

ment of that value. As pointed out in that case, the history of the statutes shows a closer approximation to that value as the legislation has evolved. And the enactments made subsequent to the decision in the *Whitridge* case are consistent with that trend. In the beginning Congress prescribed specific dollar values of specified coins. Act of July 31, 1789, § 18, 1 Stat. 29, 41. Not long after, the President was given authority to prescribe regulations for computing duties on imports where the original cost was exhibited in a depreciated currency of a foreign government. Act of March 2, 1799, § 61, 1 Stat. 627, 673. In 1873 Congress provided for an annual estimate by the Director of the Mint of the full metal value of standard coins of the various nations and a proclamation of the value by the Secretary of the Treasury. Act of March 3, 1873, 17 Stat. 602. That estimate was required to be made quarterly rather than annually by the Act of October 1, 1890, § 52, 26 Stat. 567, 624. Then came the Act of August 27, 1894, § 25, 28 Stat. 508, 552, which retained the provision for the estimate and proclamation of metallic values and gave the Secretary of the Treasury power to order a reliquidation at a different value on a showing that the value of the invoice currency in United States currency was 10 per cent more or less than the proclaimed value. *United States* v. *Whitridge, supra.* The procedure under the latter provision depended on a consular certificate to establish the percentage of depreciation of the currency. T. D. No. 23725, 5 Treas. Dec. 396. There was thus no single source (and none at all in the United States) to which customs officials could look to determine the extent to which foreign currency had depreciated. Moreover, violent fluctuations in foreign exchange rates had occurred after the first World War. It was for those reasons that § 403(c) was added to the Emergency Tariff Act of 1921, 42 Stat. 9, 17. See S. Rep. No. 16, 67th Cong., 1st Sess., p. 16; H. Rep. No. 79, 67th Cong., 1st Sess., p. 12; *Fry & Friedsam* v. *United States*, 12 Cust. App. 486, 489. And § 403(c) of the 1921 Act now appears as § 522(c) of the 1930 Act on whose meaning the present decision turns.

This history makes clear the search which has been made for a measure of the true dollar values of imported merchandise for customs purposes which was accurate (see *Cramer* v. *Arthur*, 102 U. S. 612, 617) and at the same time administratively feasible and efficient. The formula finally selected is dependent on the actual value of the foreign currency in our own money. The rate for the foreign exchange with which the imported goods are purchased is recognized as the measure of value of the foreign cur-

rency; the use of that rate reflects values in United States currency which are deemed sufficiently accurate to serve as the measure of the valuation of the goods for purposes of the *ad valorem* tax. As noted in *United States* v. *Whitridge*, *supra*, p. 144, the actual "unit of cost" conforms with the truth and the meaning of the invoice.

We would depart from that scheme if we read § 522(c) as saying that on a given date only one buying rate for a specified foreign currency could be certified by the Federal Reserve Bank of New York or proclaimed by the Secretary of the Treasury. Dual or multiple exchange rates have resulted in recent years from measures for the control and restriction of foreign exchange and export transactions.[3] In the present case the British Government fixed the "official" rate for the purchase of specified commodities for export. One who purchased woolens for export need not acquire pounds at that rate. A lower rate was available and was indeed taken advantage of by petitioner when he purchased pounds to pay for the woolens. If the higher "official" rate is used in the valuation of the woolens, the cost of the goods will be distorted and an inflated value for customs purposes will be placed upon them. Such a result would be quite out of harmony with the history of these statutes and should be avoided unless the result is plainly required by the language of § 522(c). We do not think it is.

We may assume that the dual or multiple exchange rates which have emerged were not in contemplation when the 1930 Act was passed. As we have noted, they are parts of rather recent measures for the control and restriction of foreign exchange and export transactions. But if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257; *Browder* v. *United States*, 312 U. S. 335, 339, and cases cited. Sec. 522(c) contains no language indicating that the Secretary of the Treasury has any function to perform except the publication of any buying rate which is certified. The determination of the rate is left exclusively to the Federal Reserve Bank of New York. It alone is given discretion in computing it. The duty of the Secretary to publish the certified rate is as clear as the duty of the Federal Reserve Bank of New York to determine and certify

[3] See United States Tariff Commission, Regulation of Tariffs in Foreign Countries by Administrative Action (1934); Twenty-second Annual Report of The United States Tariff Commission (1938) p. 1; Southard, Foreign Exchange Practice and Policy (1940) pp. 185 *et seq.*

it. It is true that § 522(c) speaks only of the "buying rate". And that use of the singular rather than the plural is stressed by respondent. We may note, however, in passing that § 1 of the Revised Statutes, 1 U. S. C. § 1, provides that "words importing the singular number may extend and be applied to several persons or things." Beyond that is the fact that we are construing a provision of a tariff act designed, as we have said, to value imports for customs purposes by means of the buying rate of the invoice currency. The use of the singular is not inappropriate since there is a buying rate for the foreign exchange used to purchase each separate import. We assume that the "official" rate was the all-inclusive rate and could have been used in payment of exported goods of all kinds. But § 522(c) means to us that that buying rate is to be used which is in fact applicable to the particular transaction. To look to other transactions for the buying rate is to make a valuation of a wholly hypothetical import not a valuation of the actual one before the collector of customs. Congress could, of course, choose any standard of valuation, for the purposes of the assessment and collection of duties. But Congress in this situation endeavored to provide a flexible and realistic, not an arbitrary, standard. We can indeed see no difference in principle between the use of one of several rates for the currency of a single country and the use of one of several rates each of which is for the currency of a different country. In each different rates are used to ascertain the value of specific imports. The language of § 522(c) read against the background of these statutes indicates to us that Congress undertook to provide in each case the rate which gives the closest approximation to the value in dollars of the imported merchandise. That purpose would be thwarted if in the circumstances of this case only one buying rate could be used in making the valuation of the goods. The application of the "official" rate to this particular transaction would assume that petitioner imported whiskey, furs, tin, rubber, or jute rather than woolens. The valuation of the woolens would be inflated and a higher duty would be paid than a fair reading of § 522(c) necessitates.

It is said that this result runs counter to the provisions of § 402 of the Act which require that the value of imported merchandise shall be the "foreign value or the export value, whichever is higher". But it is not apparent how that policy need in any way be defeated or impaired by the use of the "free" rate of exchange where it is in fact applicable.

Reliance for the other conclusion is also placed on the general authority given the Secretary over the collection of duties on imports[4] and over collectors of customs.[5] It is also pointed out that § 624 of the Tariff Act of 1930 provides that "In addition to the specific powers conferred by this Act, the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act."[6] But these provisions merely implement authority which is granted the Secretary and make clear the existence of authority which otherwise might be only implied. They may not be used to detract from the express authority given the Federal Reserve Bank of New York under § 522(c). But this result is criticized on the ground that it interferes with the control of foreign exchange, which fiscal function has been entrusted to the Secretary not to the Federal Reserve Bank of New York. It hardly need be pointed out in reply, however, that our decision, like § 522(c), is concerned only with the assessment and collection of duties upon imports through the use of a formula which Congress designed. If the use of that formula under the changed conditions of these war years is disadvantageous or undesirable, Congress, of course, can change it. But we cannot assume that Congress did not mean what it said when it selected the Federal Reserve Bank of New York rather than the Secretary to perform a restricted function on this single phase of the complicated foreign exchange problem.

Nor is there substance in the argument that the Secretary's action in publishing only one of the rates certified by the Bank is non-reviewable. Sec. 522(c) plainly gives discretion to the Bank to determine the buying rate. And for the reasons stated we cannot say that only one buying rate must be determined and certified.[7] The exercise of the Bank's discretionary power under

[4] "The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports as he shall judge best." Rev. Stat. § 249, 19 U. S. C. § 3. And see Rev. Stat. § 248, 5 U. S. C. § 242.

[5] "The Secretary of the Treasury shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law." Rev. Stat. § 251, 19 U. S. C., Supp. II, § 66. And see Rev. Stat. § 161, 5 U. S. C. § 22.

[6] Sec. 502(e) of the Act provides that "It shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws; and in case any difficulty arises as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary shall be binding upon all officers of the customs."

[7] The case is therefore different from Collector v. Richards, 23 Wall. 246, in that case the Director of the Mint certified two values of the franc—one

§ 522(c) is in the category of administrative or executive action which this Court held non-reviewable in *Cramer* v. *Arthur*, *supra*, and in *Hadden* v. *Merritt*, 115 U. S. 25, 27-28. And see *United States* v. *Bush & Co.*, 310 U. S. 371, 380. But the function of the Secretary in this regard is purely ministerial and is to be contrasted to other situations in which the Secretary is exercising discretionary authority. Cf. *Boske* v. *Comingore*, 177 U. S. 459. The power to publish the certified rate may not be exercised in such a way as to defeat the method of assessment which Congress has provided. Cf. *Campbell* v. *United States*, 107 U. S. 407. Congress has granted judicial review of the decisions of the collector including the legality of the orders and findings entering into the protested decision. Secs. 514-517. If the decision of the collector contravenes the statutory scheme and disregards rights which Congress has bestowed, the fact that he acts pursuant to the directions of the Secretary does not save his decision from review. *Campbell* v. *United States*, *supra*. We think that the use of the "official" rate of exchange in assessing and collecting duties upon these imports transcended the authority of the collector and of the Secretary and that the "free" rate of exchange certified by the Federal Reserve Bank of New York should have been used.

It is finally said that if more than one buying rate may be made applicable to imports from one country,[8] confusion and complexity in administration of the Tariff Act will result. But that showing would have to be far more clear and the meaning of the Act much more dubious for us to give those administrative considerations weight in the interpretative process.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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under the provisions of the Act of March 2, 1873, 17 Stat. 602, the other under the Act of May 22, 1846, 9 Stat. 14. The Director of the Mint was uncertain whether the latter act had been repealed by the former. The Secretary proclaimed the rate estimated by the Director under the 1873 Act. This Court sustained a collection of duties on that basis, holding that the provisions of the 1873 Act controlled. Thus the decision was that only one value of the franc controlled, not that the power of the Secretary to proclaim the value included the power to choose between two available ones.

[8] It should be noted that where two or more currencies of different character circulate in a foreign country the Treasury has provided for the use of the foreign exchange rate for each, the rate used being the rate for the currency in which the same or similar merchandise is usually bought and sold in the ordinary course of trade. See Customs Regulations of 1937, Art. 776(a) and (e), as amended by Treas. Dec. 50251(i) and (j), October 10, 1940.

Mr. Justice FRANKFURTER, dissenting.

As part of the effective financial conduct of the war, the United Kingdom brought sterling under control by fixing its exchange value. A limited supply of sterling in foreign countries presented a special problem. But though that supply was out of its bounds, Great Britain by various mechanisms could bring it under control. Apparently it moved to do so as quickly as economic and political considerations permitted. See the statement of the Chancellor of the Exchequer on April 9, 1940, in reply to various questions in the House of Commons, 359 H. C. Deb. (5th ser. 1940) 461-463. Thus, while "the vast bulk of transactions between sterling and other currencies" was conducted at the exchange rate fixed by the Government, the supply and demand of sterling abroad created a market. By virtue of various British restrictions this free sterling market became increasingly thin. See 26 Fed. Res. Bull. (July, 1940) 638; The Commercial and Financial Chronicle, April 20, 1940, Vol. 150, Pt. 2, pp. 2478-79. Nevertheless, until the British Government completely clamped down on the use of this free sterling in payment of exports, it was possible to pay for such exports in sterling purchased at a lower rate than that which the British Government believed to be a reflection of the true value of the pound and officially fixed as such.

Plainly enough, a single currency having multiple values has important bearings upon the flow of goods and upon international economic relations. In the case of Great Britain, the situation may not have been serious because, as we noted, free sterling played a relatively small share in the economic interchange between the two countries. The "free" rate was employed only in limited transactions and evidently represented on the part of Great Britain merely a transitory compromise with circumstances. In short, the official rate was not an unreality. But in the case of some countries, a dual system of rates of exchange may have decisive economic effects through highly organized manipulation of exchange, with all the evils that result from confusion and from depreciated currencies.

To dispose of the case on the assumption that it merely involves enforcement of a Congressional policy for assuring approximate accuracy in determining the true dollar value of a particular importation is to throw the significance of the case out of focus. The problem, as I see it, is whether Congress by § 522(c) of the Tariff Act of 1930, 46 Stat. 590, 739, 31 U. S. C. § 372(c), prohib-

ited the Secretary of the Treasury from safeguarding the public interest as he did, in relation to dislocations in the money markets following the outbreak of the war and to their repercussions both upon our domestic economy and our international relations. That the Treasury's instruction to the collectors of customs to assess tariff duties on the basis of the sterling rate fixed by the British Government was not an ordinary Treasury order affecting the collection of revenue is attested by the fact that the instruction was the result of a conference of the Secretary of State, the Secretary of the Treasury, the Attorney General and the Secretary of Agriculture. See New York Times, April 17, 1940, p. 4, col. 5; The Commercial and Financial Chronicle, April 20, 1940, Vol. 150, Pt. 2, pp. 2478-79.

It is not suggested that apart from § 522(e) this Government could not protect its interests in relation to the abnormal currency situations precipitated by the war through such action as the Secretary of the Treasury here took. The wide duties of financial supervision possessed by the Secretary by virtue of his office and the broad powers implied in various provisions of law, see for instance: 5 U. S. C. § 242, 19 U. S. C. § 3; § 624 of the Tariff Act of 1930, 46 Stat. 590, 759, 19 U. S. C. § 1624, and *Boske* v. *Comingore*, 177 U. S. 459, would give him ample warrant to fix a rate for dollar conversions of foreign currencies on a uniform basis reflecting the dominant value among multiple values of a foreign currency and one not subject to manipulations or influences adverse to our interests.

Withdrawal of this power of the Secretary of the Treasury implies a radical curtailment of his historic and appropriate authority to protect the nation's fiscal interests. If it chose, of course Congress could so curtail the Secretary's powers. But such an important change in the executive responsibility for our fiscal affairs ought to be disclosed through some unequivocal Congressional expression. To find such destructive force in § 522(e) is to attribute to it a potency not designed by Congress. It is conceded that in the legislation which is now § 522(e) Congress was concerned solely with fluctuations in a single exchange rate, a problem thrown up after the First World War. And so Congress designated the Federal Reserve Bank as a fact-finding agency to ascertain the most durable among fluctuating quotations. But multiple rates for a single currency—with their effects upon the flow of goods and upon international economic relations and the opportunities they afford for highly organized manipulations of

exchange—present a totally different problem. That problem, as is admitted by the Federal Reserve Bank appearing before us as *amicus curiae*, was not at all in the contemplation of Congress. That problem was not dealt with by Congress because it did not confront Congress. As a problem it did not emerge until, in 1940, the present war confronted the Federal Reserve Bank and the Secretary of the Treasury with it.

The Federal Reserve Bank and the Secretary of the Treasury, having different functions, naturally dealt with it differently. Although, to be sure, § 522(c) charged the Federal Reserve Bank with the ascertainment of a single exchange rate, the Bank naturally enough solved the dilemma which confronted it when there were two rates for sterling by reporting both, although the significance of the two rates and the range of their functions varied greatly. It was not for the Bank to pick only one rate, for the Bank is merely a reporting agency and not a policy-making agency. But the determination whether one of the two rates is *the* rate, and if so which should have that fiscal function, is a policy problem, and the Secretary of the Treasury is the agency vested with responsibility for fiscal policies.

For the selection by the Secretary of the Treasury of an exchange rate in a situation like the one before us has implications far beyond translating into dollars the value at which a particular importer actually settled for the foreign price of his goods. The selection of the governing rate of exchange in the case of multiple rates affects at least three very important phases of our international economic relations. By § 402 of the Tariff Act of 1930, 46 Stat. 590, 708, 19 U. S. C. § 1402, in the assessment of *ad valorem* duties it is necessary to ascertain the foreign market value, which normally means the foreign home value. Commodities subject to the "official" rate and commodities available through "free" sterling may well have an identical home value and yet, according to the contention of the importer, one valuation would have to be reached according to § 522(c) and another according to § 402. Again, the Secretary of the Treasury may impose countervailing duties whenever he finds that imported goods enjoy a bounty, direct or indirect. Section 303 of the Tariff Act of 1930, 46 Stat. 590, 687, 19 U. S. C. § 1303. Such bounties may readily take the form of favorable exchange rates. An unwarrantably rigid denial to the Secretary of the determination of an exchange rate which in substance corresponds to the realties of international exchange may force him to exercise the penalizing power of imposing counter-

vailing duties. Finally, foreign exchange rates affect the fruitful use of foreign trade agreements. Section 350 of the Tariff Act of 1930 as amended by 48 Stat. 943, 19 U. S. C. § 1351 *et seq.*

All these dangerous potentialities would of course be irrelevant if Congress had dealt with the problem of multiple rates in a rigid way and put the responsibility upon the Federal Reserve Bank to select one of such multiple rates. But the hand of the Government ought not to be tied too closely where, to put it mildly, the Congressional purpose has been ambiguously expressed. We cannot find such purpose from a reading of what Congress has written. We are hardly justified in assuming that if Congress had addressed itself to this problem it would have tied the hands of the Secretary of the Treasury and brought into play all the difficulties that have been indicated in the ascertainment of foreign home value, in the imposition of countervailing duties, and in embarrassing the policy of trade agreements. The power of Congress to pass new legislation is hardly a reason for giving old legislation a construction that disregards its history and its context and the unhappy consequences of such disregard.

Of course, general condemnation of a practice covers any specific manifestation of it, even though the latter was "unforeseen" by Congress, *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, just as a general outlawry of the use of a false document hits also a use to which the document was not "ordinarily" put when the legislation was passed. *Browder* v. *United States*, 312 U. S. 335. But these are instances of proper statutory construction quite irrelevant to the present case. It is one thing for judges not to excise a particular situation from language appropriately describing a general problem. Judicial interpolation into a statute of a wholly unrelated problem, not envisaged by Congress is quite another matter. In this case we have not an unforeseen situation fitting into a general context. Here we have an unforeseen problem with which Congress did not deal and yet, by not dealing with it, is said to have taken away authority theretofore belonging to the Secretary of the Treasury. If the problem itself was not in the contemplation of Congress, as this problem was not, how can it be said that Congress legislated concerning that problem unless it be that legislation is the product of disembodied dreams.

The judgment should be affirmed.

Mr. Justice Black joins in this dissent.